

228 C/18

T H E

D E C I S I O N S

O F T H E

C O U R T O F S E S S I O N .

F R O M I T S

I N S T I T U T I O N till the Year 1764

W I T H S E V E R A L

D E C I S I O N S S I N C E T H A T P E R I O D .

A R R A N G E D U N D E R P R O P E R T I T L E S ,

I N T H E F O R M O F

A D I C T I O N A R Y .

I N F I V E V O L U M E S .

L O N D O N :

Sold for the Editor by *W. Hay*, at the Artists Exhibition-hall, near Exeter Change; *T. Cadell*, opposite Catherine Street; *W. Brown*, Corner of Essex Street, Strand; by *Mrs. Follingsby*, within Temple Bar, Fleetstreet: And by *C. Elliot*, in Edinburgh.

M D C C L X X I V .

Entered at Stationers Hall.



THE
DECISIONS
OF THE
COURT OF SESSION,
FROM ITS
INSTITUTION till the Year 1764
WITH SEVERAL
DECISIONS SINCE THAT PERIOD.
ARRANGED UNDER PROPER TITLES,
IN THE FORM OF
A DICTIONARY.

VOLUME V.

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Sold for the Editor by *W. Hay*, at the Artists Exhibition-hall, near Exeter 'Change; *T. Cadell*, opposite Catherine Street; *W. Brown*, Corner of Essex Street, Strand; by *Mrs. Follingsby*, within Temple Bar, Fleetstreet; And by *C. Elliot*, in Edinburgh.

M DCC LXXIV.

THE

DISCLOSURE

COURT OF APPEALS

INSTITUTION

DECISIONS SINCE THAT TIME

AND A REVERSE



VOLUME IV

FOR THE YEAR 1880

OF THE COURT OF APPEALS

IN THE STATE OF NEW YORK

AND OF THE COURTS OF THE

COUNTY OF NEW YORK

AND OF THE COURTS OF THE

CITY OF NEW YORK

AND OF THE COURTS OF THE

CITY OF ALBANY



U D A L R I G H T S.

T H E Lords found, That udal lands must be
 bruiked by some lawful title, and that naked
 kindness and natural possession is not sufficient
 to give right thereto. Hadd, penult. March, 1624,
 Sinclair.

U L T I M U S H E R E S.

W H E N the issue of a bastard all
 fail, the King is *ultimus heres*, to *When it takes*
 the last of them, for there is no collate- *place?*
 ral or ascendant succession of the bastard.

Dur. 13. July, 1626. Halero.

A DONATOR of *ultimus heres*, tho' liable to the
 deceased's debts *in valorem* of the sub-
 ject, is not in the case of an executor, *Can the dona-*
 who must fairly accompt for the subjects *tor defend him-*
 confirmed, and cannot defend himself *self upon a se-*
 upon singular titles; therefore, a dona- *parate right?*
 tor of *ultimus heres*, was allowed to
 compete with the creditors upon a gift of recognition
 acquired by him. Fount. 3. and 4. Feb. 1686. Crea-
 tions of Dundee. — But the donator was found liable
 to accompt for the rents intromitted with by him upon
 that title, before he acquired the gift of recognition;
 tho' he objected, that the deceased had made a dis-
 position of his estate, which rendered the gift of *ultimus*
heres

heres of no effect, in respect it was answered, that he could not object the defect of his own title. Hare. (Airs) March, 1686. *Inter eosd.*

UNION.

SASINE taken upon a charter granted by a subject, uniting the lands in one tenement, was found ineffectual as to the discontinuous lands, because none can create an union except the King. Dur. Hadd. 16. Jan. 1623. Aitkin. Dur. 16. Dec. 1628. Borthwick. Dur. 10. Feb. 1631. Galloway. — But an union was found sufficiently established by the King's confirmation of a charter, bearing a clause of union. Dur. 26. Jan. 1636. Borthwick.

THE Lords sustained the sasine of a mill as a sufficient active title, tho' it bore only the symbols of earth and stone, and tho' a mill is *distinctum tenementum*, and requires delivery of the clap and happer, and this because the charter bore a dispensation to take infeftment at the manor place for the whole, and yet the lands were not erected into a barony. Fount. 1. Dec. 1686. Hamilton. — Lands lying discontinuous, and in different shires, being erected into one barony by the crown, and one particular place appointed for taking infeftment to affect the whole barony; a sale infeftment, taken by precept from the King's vassal, at the place appointed by the charter from the crown, is good for the whole lands. Dur. 22. June, and 11. July, 1637. Blairquhon. — But sasine taken at a different place than that appointed by the charter, will only be effectual for the lands contiguous to the place where taken. Dur. 23. July, 1629. Ednem. 19. March, 1636. Lauristoun.

LANDS being erected into a barony, without mention of union, or that sasine taken at one particular place, should be sufficient for the whole; one sasine taken will be sufficient to establish a real right upon all the contiguous lands, but not upon those which are discontiguous.

Hope, (*Sasine*) 8. March, 1620.

Dur. 16. Nov.

1630. Clackmannan.

Dur. 10. Feb. 1631.

Galloway.—Lands lying runridge within burgh, if a party take sasine upon one part thereof, it was found sufficient, and that he could not be compelled to take it at the particular ridges, acres, or sheds thereof.

Hadd.

Home.—A few acres being purchased by Lord Kincardin from several heritors, and being inclosed in one park with some of his own land, and so naturally united; a dispensation by a subject, for taking sasine at one place for the whole, was found sufficient, without a formal erection and union from the King. Harc. (*Infeftment*) Feb. 1686. Kincardin.

TWO feus, belonging to different vassals, but lying contiguous, and contained both in one superior's charter, having been purchased in by one person, it was argued, That this naturally made an union, so as to be in the power of the purchaser, by giving infeftment in any one spot, to make it extend over both tenements; which was repelled, in respect, that tho' the tenements lying contiguous, were naturally united in the superior's person, who possessed them both by one title, it was not so with the vassal, who possessing them by distinct titles, derived from different authors, as to him they were no more united, than if lying from one another at the greatest distance. July, 1729. Bank of Scotland.

310, Where the lands are contiguous, but not in one charter.

SASINE of the office of a ballie of regality was sustained, tho' appointed by the Lord of the regality's precept, insert therein, to be taken at his castle for all the lands within the bailiary, altho' the lands lay far discontiguous, and a subject cannot make an union, and that because this was no union of lands,

410, Sasine of a jurisdiction.

but only a place designed for taking sasine of a jurisdiction granted by the lord, which he might freely appoint; and many thought that no sasine in such cases is requisite. Dur. Spot. (*Bailiary*) Auch. (*Sasine*). 19. Jan. 1630. Bruce.

A SASINE of lands given to the liferenter, dissolves not the union of these lands with other lands. *Union, how dissolved.* Balg. (*Sasine*) 1. Feb. 1564. Sympington. By a charter from the crown, the several baronies, lands, &c. belonging to the Lord Auchterhouse, were united into the Earldom of Buchan, with a dispensation for taking investiture of the whole at the castle of Banff; this castle being afterwards dissolved from the Earldom by alienation, a sasine of the Earldom taken thereafter, as formerly, was found null. Jan. 1725. Buchan.

IF lands remain united in the person of a singular successor? See *Personal and Transmissible*.

UNIVERSITY.

UPON a vacancy of the office of civilist, or professor of civil law, in the King's College in the university of Aberdeen, the proper electors met to fill it up, when, confessedly, the majority of the votes fell upon Mr James Catanach, procurator before the courts at Aberdeen, and the minority upon Mr Charles Hamilton-Gordon Advocate: hence arose a competition between these gentlemen, wherein each objected to the others being qualified to hold the office, and insisted that himself was only capable thereof. Pled for Mr Catanach, That by the foundation, the civilist ought to be a doctor of laws, or if that could not be had, a *licentiatum cum rigore examinis*, without which quality, no person was capable of being chosen: That he was possessed of this quality, as having been admitted doctor by the Marischal College

UNIVERSITY.

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lege of Aberdeen, who had power, and were in use to confer such degrees, and Mr Gordon had it not. Supposing any defect in his degrees, or that the qualification was in dispute, he was in *pari casu* in that respect, and behoved to carry it by plurality of votes. Pled for Mr Gordon, That as university degrees, considered as necessary qualifications, were undoubtedly in disuse since the reformation, in so much that few professors of divinity were doctors; he was qualified in the meaning of the foundation, having been admitted advocate before the court of session *cum rigore examinatus*; and Mr Catanach was not, having obtained a diploma, from a body not entitled to give one, nor till of late assuming any such power, and that without any examination. It appeared, that Advocates had very early been looked upon as capable, and when others were admitted, they were taken bound to obtain themselves made doctors of laws. Pled further for Mr Catanach, That several who were no advocates had granted no such bonds; and that in the case of those who had granted them, who were only two, the true occasion was, that the university having no funds for salaries, the professors were obliged to take the office without any, and give bond to teach as soon as it was endowed; and the other clause had been thrown in beside the principal intention. The Lords found, That James Catanach was not duly qualified to be elected professor of the civil law in the King's college of Aberdeen, and that Mr Charles Hamilton-Gordon was duly qualified to be elected into the said office; and on a reclaiming bill and answers they adhered: Falc. v. I. p. 15. 4. Dec. 1744. Catanach. This was reversed on appeal.

IN the King's College of Aberdeen, the principal has both a deliberative and a casting vote, whereby it was carried to be comprehended in the scheme for providing the widows of ministers and professors. Falc. v. II. p. 38. 9. Jan. 1749. The Trustees for the Fund for providing Ministers Widows, against the King's College of Aberdeen.

U S U R Y.

A CONTRACT for usury annualrent, is not punishable where the lawful annualrent is only taken. *Ersk. 8. March, 1623. King's Advocate.*—A contract containing annualrent, far above what was allowed by law, was sustained, because the party had got no payment of that extraordinary profit, and was content, when sued for usury, to restrict to the ordinary annualrent. *Hadd. 23. Feb. 1610. Wauchop.*

A PARTY for love and favor, having disposed his lands, redeemable for 12,000 merks, and having taken a backrack of the same, bearing a duty more than the legal interest; this was found to be lawful, seeing usury relates to borrowed money only. *Dur. 6. March, 1632. Gathland.*—Carmichael and Stalker joined in a copartnery of book-felling at Glasgow; Carmichael stocked in two thirds, amounting to L. 212, and the profits were to be divided equally between them, because Stalker was to undertake the whole management; they afterwards entered into a new contract for three years, wherein they declared the former copartnery dissolved, “Carmichael conveys to Stalker his stock and profits, to be restored to him in money or books at the end of three years; and Stalker on the other part, became bound to pay him L. 46 yearly, at four terms in the year.” This was not found a covered loan. It was pleaded to be a bargain of hazard, Stalker giving his partner a certain sum in lieu of profits, taking his chance whether they should be more or less; and therefore, the Lords repelled the objection of usury. *15. Jan. 1735. Stalker.*

A BOND

USURY.

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A BOND for a perpetual annuity, above the legal annualrent, redeemable by the debtor, on payment of the principal sum and hygone annuities resting at the time, was found to be usurious, altho' the principal sum was sunk *quoad* the creditor, who could not charge for payment thereof upon the bond. Forb. 26. Jan. 1709. Colvil.

IT is an usurious paction to stipulate, That each term's annualrent should bear annualrent after falling due. Stair, Gof. 26. Jan. 1669. *Perpetual annuity above the legal interest.* Braid.—It is lawful at the time of *Stipulation for annualrent of annualrent.* lending the money, and making the bond, to add to the principal whatever annualrents shall fall due between the date of the bond and the term of payment, making one accumulate sum, bearing interest from the term of payment. Home, Feb. 1718. Sinclair.

TAKING annualrent before the term of its payment, infers usury. Stair, 1. Dec. 1680. Johnston.—But a backrack of wadset-lands having been taken by the granter of the wadset for a yearly rent, corresponding to the annualrent of the wadset-sum, but payable before annualrent could fall due upon the wadset-sum; the same was not found usurious, being the rent of the land, which might be made payable as the parties could agree. Dur. 6. Feb. 1622. Pitligo.

A BOND being granted, bearing annualrent a quarter before its date, but not bearing to be for borrowed money, but "That the party is justly addebted, resting and owing," the Lords sustained this to take off the presumption of usury, unless it was proved by the creditor's oath, that it was not resting at the preceding term. Fount. 9. Feb. 1697. McCulloch.—A bond dated 23. April, bearing annualrent from the Martinmas preceding, was not found usurious, containing in the narrative "justly addebted and resting," tho' it did not bear a declaration that the money was lent at Martinmas. Forb. 7. Nov. 1711. Scot.

A CREDITOR.

A CREDITOR being sued for usury, he having taken the full year's annualrent, without allowing retention to the debtor, conform to the act of parliament, gave in this defence, That he had taken no more than the legal interest, which was 6 *per cent.* and as to not allowing the retention of one *per cent.* it might infer repetition, but not a forfeiture, seeing there was no such certification in the act; the Lords, in respect that creditors might doubt, whether the not allowing of retention inferred usury, found, That taking the full annual, if the same was allowed or repaid within the year of retention, did not infer usury, but if not done, that it should infer the same: for they found, That if the certification was only repetition, it would not be effectual, since the debtor might certainly renounce that benefit. Stair, 30. July, 1673. Stewenson.—When retention of one *per cent.* of annualrent was allowed by the act of parl. 1672, a countryman having received his annualrent, without making that allowance; in a suspension of double pouding, where a party, who had a general gift of usury from the King, compeared and craved the principal sum, as due to him by law; the Lords found, That usury was not thereby inferred, in respect that the act of parliament does not express the penalty of not allowing retention to be usury, and also because of the rusticity of the party, and smallness of the sum not retained, and ambiguity of the practice as to this point; and therefore, found the letters orderly proceeded, except as to the sum whereof the debtor should have had retention. Home, March, 1682. Dickson.

IT was found to be usury, that a creditor took more than six *per cent.* after the act of parl. 1649, reducing annualrent to 6 *per cent.* tho' that act was thereafter rescinded. Stair, 22. July, 1675. Geddes.

A PARTY having borrowed money from the bank of Scotland, at four *per cent.* while the legal interest was at five, with a provision to pay six *per cent.* if he failed in payment

Stipulating more than the

USURY.

payment a month after the term; the *legal annual-*
 Lords found the whole six due, not as *rent as a fail-*
 annualrent, but as damage liquidated *ure.*
 between the parties. Fount. 23. July,
 1697. Bank of Scotland.

A SUM being contained in an obligation, with a
 backbond written on the back thereof,
 declaring that the creditor, in case *Stipulating a*
 if payment of the half of the sum, at a *greater prin-*
 day certain, should discharge the whole; *cipat sum as*
 the debtor having failed, the Lords *a failure.*
 found, That he might be charged for
 the whole, and that it was not usury. Hadd. July,

1595. Craven.—Philorth having obliged himself to
 deliver at Whitsunday 1604, 4000 bolls of victual;
 and failing to do so, to pay *L. 4* for the boll, but if he
 paid 6000 merks before the term, he should be free;
 the bond being suspended as against the act 1597; the
 Lords sustained the bond for the principal sum of 6000
 merks, and annualrent at ten *per cent.* Hadd.
 result. Feb. 1622. Philorth.

A WADSET is not reckoned usuri-
 ous, where the wadsetter bears the ha- *Usurious clauses*
 zard of the rents, tho' they far exceed *in wadsets.*
 the annualrent of the wadset sum. Dur.

11. Dec. 1623. Colington.

ONE having wadset his land for *L. 1000*, when the
 legal interest was at ten *per cent.* and warranted the
 same to be worth 22 bolls yearly, which, according to
 the conversion established by the act 52. parl. 1587,
 was two bolls above the common interest; and the
 wadsetter, who had recovered but 20 bolls yearly out
 of the lands, insisting against the reverser, upon his
 warrandice, for payment of the other two bolls, due
 many years *retro*: the Lords found, That this being a
 proper wadset, and no backtack for payment of a great-
 er duty than the legal interest, did not fall under the
 act 251. parl. 1597; and therefore, the wadsetter
 might uplift the whole rents, however great, out of
 the land; but then they found, That the clause of war-
 randice could not be effectual, seeing it landed in a
 personal action for payment of annualrent greater than
 what is allowed by law. Dur. 6. July, 1630. Nisbet.

—By

—By act 62. parl. 1661, it is declared, "That proper wadsets, granted since the 1649, exceeding the legal interest, and yet burdening the reverser with the hazard of the fruits, tenants, war, or troubles, shall be restricted to the neat annualrent, and the wadsetter be accountable for the surplus;" upon this footing a proper wadset being conceived, with a clause warranting the wadsetter "against all maintenance, taxations, and other impositions," the wadsetter was found obliged to accompt in terms of the act. Stair, 17. Feb. 1672. Douglas.—But the contrary was found. Jan. 1728. Creditors of Elliot.—And tho' the wadsetter was warranted against levies of horse, feu-duties, and ministers stipends, he was not found obliged to accompt, seeing he run the risque of the fruits, tenants, war, and vastation. Dirl. 24. Jan. 1677. Home.—Found, That a wadset, tho' very lucrative, and bearing relief of all public burdens, and of some of the hazards mentioned in the act, was not to be restricted to the annualrent, in respect it did not secure against all the hazards mentioned in the act, viz. fruits, tenants, or war. Harc. (*Wadset*) Falc. 9. Dec. 1685. Cuningham.—A wadset being granted in the year 1653, for 24,500 merks, the reverser warranting the rents to be yearly twelve chalders of bear; the wadsetter, here, was found accomptable, tho' he run the hazard of the price of the victual, which might possibly have fallen below the annualrent of the money; which hazard was not regarded, seeing where a creditor does even stipulate directly more than the legal interest, he runs the chance of his debtor's solvency. Home, 18. July, 1718. Dougl.

IN a proper wadset, which at the same time was abundantly lucrative, besides repayment of the wadset sum of £. 12,000 Scots, it was stipulated that the reverser should not redeem till he also paid the annualrent of £. 1000 Scots from the date of the contract; and the wadsetter was impowered to use requisition for these annualrents, as well as for the wadset sum itself: in a declarator of redemption this clause was quarrelled as both usurious and penal; usurious, as tending to secure the creditor in more than the legal interest; penal, being contrived to bar redemption. The wad-

setter

letter answered, That this clause did indeed make the wadset more lucrative, but it could not be usurious, as not falling under any of the acts anent usury, nor penal, being a part of the original transaction, and not stipulated as a failure. The Lords repelled the objection. Dec. 1734. Ramsay.

A WADSET being granted to a brother for his portion, containing a 19 years tack, to commence after redemption of the wadset; the tack was sustained, tho' far within the rent of the lands, notwithstanding the act 1449. c. 19. Stair, 21. Jan. 1662. Polwarth.—In a declaration of redemption, a three years

Tack adjoined to a wadset, within the real rent of the lands.

tack being craved by the defender, after redemption, conform to a clause in the wadset, tho' the tack-duty was but worth the third part of the true rent; the Lords repelled this demand, and found all such tacks null by way of exception, and so revived the aforesaid act, which was gone in desuetude. Newb. 8. Feb. 1666. Ley.—A backtack, to take place after redemption of the wadset, was found valid, unless the duty was far under what the lands paid the time of the wadset, and that regard was not to be had to the worth of the land at the time of redemption; for if the wadsetter, upon consideration of the tack, had improved the land before redemption, he ought to have the benefit. Stair, 17. Feb. 1672. Douglas.

IN security of a debt of 4000 merks, the debtor set to his creditor a tack of lands, giving the creditor his choice to pay 53 bolls victual yearly, or twenty shillings Scots less than the Candlemas fiars; this tack was sustained, tho' plainly lucrative, it being to be reached by no standing law, and lucrative tacks are no more usurious than lucrative wadsets. Stair, 23. Nov. 1664. Scot.—In the year 1704, while annualrent was at six per cent. M'Lellan, for the sum of 4500 merks, sold some lands to Barclay, and of the same date took from him a tack of the same for 10 years, for L. 120 of money rent, and 18 bolls victual, or ten merks per boll, in the option of the tackfman, out of which tack-duty he was to advance the whole teind, being L. 40 yearly,

Usurious clauses in tacks.

yearly, and half of the cess; there was a clause ad-
 jected of a reversion competent to the seller, during
 the years of the tack, upon repayment of the said
 4500 merks. It was objected against the contract,
 That it appeared to be but a covered loan, and that
 a tack-duty being made certain to the creditor, exceed-
 ing the ordinary annualrent, the bargain was usurious
 and the disposition and tack were null. The Lords re-
 pelled the objection. Feb. 1727. M'Lellan.

A PARTY having exacted 20 s. Scots more than his
 neat annualrent, the Lords judging that
Where the ex- it had happened thro' pure mistake, they
action happens repelled this reason of suspension, and
by mistake. found no usury in this case, but ordin-
 ed the charger to restore the sum so ex-
 acted, or allow it in the next year's annualrent. Fount.
 Forb. 24. July 1706. Donaldson.—The Lords re-
 fused to infer usury from the taking thro' mistake twice
 payment of the ordinary annualrent for one term. Forb.
 MS. 29. Jan. 1714. Town of Aberdeen.

USURIOUS stipulation pleaded upon, to cut down
 adjudication. *See Adjudication.*

VASSAL.

*Casualties of
 superiority, whe-
 ther they fall by
 the debtor or ad-
 judger?*

IN an action of removing, it was
 found, That the ward of the lands
 could not fall into the King's hands by
 the death of Patrick Lord Sinclair, be-
 cause not only a comprising was led a-
 gainst him before his death, but also
 his majesty, upon the comprising, had given a charter;
 and altho' the Lord Sinclair died before sasine, yet that
 could not prejudice the comprising and infestment.
 Hope, (*Ward*) 29. Nov. 1615. Hamilton.—A credi-
 tor having comprised lands from his debtor, and being
 infest thereupon, and, after the debtor's decease, ob-
 taining a gift of nonentry of the lands; the Lords su-
 stained process of nonentry at his instance, altho' the
 lands

lands seemed full by his own investment; because, that if the comprising proved not good, he might clothe himself with the other right. Spot. (*Nantergy*) 2. Dec. 1630. Yester.—An apprising with a charge denudes not the vassal, nor hinders his liferent-esccheat to fall. Stair, 28. June, 1667, Douglas.—Apprising with a charge against the superior, do not state the appriser as vassal; and the apprising being of ward-lands, the ward was found to fall by the death of the debtor, who still continued in the property, and not by the death of the appriser. Stair, Gof. 9. Feb. 1669. Black.—A gratuitous bond granted by a ward vassal to his apparent heir, in order to lead an adjudication, upon which the heir was infest during his predecessor's life, was found to exclude the casualty of ward; for simulation or fraud could not be relevant in this case, seeing the vassal might have directly resigned the lands in favor of his heir, and the King refuses no person; but it was found, that so soon as the apprising is extinct, whether before or after the deceased's death, the ward takes effect. Stair. 20. July, 1671. Lindsay.—A compriser of ward-lands being satisfied before his death, tho' he never renounced; the Lords found, That his son's ward or marriage does not fall to the superior by his death, but by the death of the debtor, against whom the comprising was led. Gof. 19. Dec. 1672. King's Advocate.—The Lords found, That the avail of tocher or marriage, falls due by the death of the appriser of ward-lands, he being infest on his apprising, tho' the legal be- get current; and accordingly modified two years rent, not only of the apprised lands, but of the appriser's whole other estate, and decerned personally for it; as also, the ground of the apprised lands to be pointed, but only in so far as the sums in the apprising would extend to, and no further, because it was not expired. Count. 13. Stair, 28. July, 1680. King's Advocate, &c.—In an action of recognition, the Lords found, that a confirmation, granted by the superior, after he was denuded by expired comprisings, could not defend against recognition. Home, Jan. 1684. Shearer.—The Lords found recognition incurred by the superior's deeds within the legal, and that it could not fall by any deed of the appriser, who had only a real
 VOL. V. B pledge

pledge for security of his money, in the apprised or adjudged lands, during the currency of the legal, but did not fully denude the debtor, till after the legal was outrun. Fount. Dalr. Forb: 15. July, 1707. Creditors of Edinglassie. — No casualty of superiority doth fall thro' the death of an appriser infest, who, during the legal, has conveyed his right by disposition in favor of the reverser, recorded in the register of reversions. Forb. 12. Feb. 1713. Erskine. — A ward vassal, against whom many adjudications had been led, dying, and leaving his eldest son an infant; in a competition between the donator of ward and the adjudgers, the Lords were of opinion, That ward did not fall by the death of the appriser within the legal, tho' infest and in possession; for that during the legal he was considered in no other shape than as a creditor, and, even after the legal, it was in his option either to keep up his debt, or to lay hold of the lands in lieu thereof, and if he did not choose to possess, he was understood to adhere to his claim as a creditor; and that it would create great confusion, was it otherways; adjudgers come in *pari passu*, and as every one of them may be infest during the legal, it was questioned, by the death of which of them shall the ward fall? Upon these considerations they found, That the ward had fallen by the death of the debtor. 24. July, 1739. Donator of ward.

THE ward was found to fall
Whether by the debtor or improper wadsetter? by the death of an improper wadsetter infest. Harc. (*Ward*) 15. Feb. 1688. Lord Chancellor.

MR M'KENZIE of Highfield is the crown's vassal in the lands of Drumderfit, part of the Earldom of Ross, which, in the exchequer rent-roll, stood charged with the following feu-duties, *viz.* L. 11 : 16 : 0 of Scots money, 2 chalders 8 bolls 2 firlots 2 pecks bear, 4 bolls oats, 1 mart, 1 mutton, and 57 hens; and Highfield and his predecessors had been in use to pay for the above particulars, conform to the exchequer-conversions. Upon inspection of Highfield's charter, it appeared, that the article of bear was 2 bolls 1 firlot 2 pecks higher by the exchequer rent-roll than

man by the *reddendo* of the charter; and that 80 loads of peats, deliverable at the castle of Dingwall, were omitted in the exchequer rent-roll, tho' specified in the *reddendo* of the charter. Highfield being charged for payment of the arrears of this feu-duty, conform to the exchequer-rental, and usual conversions, obtained suspension upon this ground, That upon the article of bear, he was charged with a higher quantity than was payable by the *reddendo* of his charter. This suspension came to be discussed before the Lord Anchinleck, and the only question debated was, with respect to the said additional 2 bolls 1 firiot 2 pecks bear, and with respect to the 80 loads of peats deliverable at the castle of Dingwall, mentioned in the charter, in place of which, the charger alledged the additional bear had been immemorially paid, and received by the crown, out of favor to the vassal. The Lord Ordinary found the letters orderly proceeded as to all the other articles; but made avisandum to the Lords with the 2 bolls 1 firiot 2 pecks bear, and the firing; and ordered memorials to be given in upon these points, *viz.* What is the import of the *reddendo*, so far as concerns the fuel? What influence the mosses being exhausted in the vassal's lands, and so incapable to afford firing, will have? and also, What influence the castle, to which they were to be carried, being now no more, has? Pleased for the suspender, that it was notorious in the country, that the castle of Dingwall has been long destroyed, and that there is not one stone of it now left. Neither can it be decided, that there are no mosses belonging to the lands of Drumderfit, out of which these peats could now be furnished; and therefore, they cannot now be demanded. The moss from which the peats were to be got being now exhausted, and the house to which they were to be carried being no more, there are no *termini habiles* for making the demand; nor can the vassal, in these circumstances, be obliged to pay an equivalent, seeing *per eum non fiat*, that the service is not performed. The Lords suspended the letters, so far as concerned the 2 bolls 1 firiot 2 pecks bear; but found the suspender liable in the payment of 80 loads of peats. Fac. Col. v. III. p. 258. 20. June, 1763. Monro.

VENTRE INSPICIENDO.

ROBERT ROSS writer in Edinburgh, being informed, on his death-bed, that Margaret Gray his wife, gave herself out to be with child, and considering the many attempts she had made to strangle him, and the suspicions of her disloyalty to his bed, so that he had not cohabited with her for sundry months, he did sign a declaration, bearing, That if she brought forth any child after his decease, and if it did not answer the time he named, then he disowned it as none of his, and entreated the judges it might not succeed in any part of his estate heritable or moveable. He deceasing, and she still averring herself to be with child, Janet and Anna Rosses his sisters, as nearest heirs, gave in a bill to the Lords, representing the foresaid matter of fact, and that, by her treachery, a suppositious birth might not be obtruded to carry away the estate belonging to them; and therefore supplicating, that conform to the famous edict of the Roman law, *de ventre inspiciendo*, some may be appointed to visit and oversee her, and that she should intimate a month before the supposed time of her delivery to the heirs, that some grave matrons and other witnesses may attend, to prevent all fraud and subornation; with certification, that if she fail, the child shall have no claim nor interest in his succession. The like had been craved and granted in 1695, in the case of Marjory Forbes, Lady Drum, whose husband, was commonly reputed impotent; and in the case of the Emperor Henry's wife, called Constantia, she bore her child on a public theatre in the market place, because, being fifty, the next heirs doubted her being with child. The Lords questioned, how far such a complaint should be received summarily, it seeming more competent to the Commissaries only; yet in respect of the husband's declarations, and the flagrant report of the case, they appointed Lord Whitehill to call her, and

VIOLENT PROFITS.

17

and intimate that she might give advertisement some competent time before her delivery, that he ordain midwives and others to be present, to prevent all abuses, and, if he thought fit, that he cause inspect her presently, whether they thought her with child or not. Fount. v. Il. p. 56. 30. June, 1699. Rosses.

VIOLENT PROFITS.

W H E R E a lady liferentrix, made an assignee to an action of removing, and died after litiscontestation, the Lords *In a removing.* found, That the defenders had thereby an emergent exception to elide the summons touching the removing itself, but decerned them in violent profits at the assignee's instance, from the time of the warning to the liferentrix's death. Hadd. 2. June, 1595. Rosses.

ACTION for double mail as violent profits, was sustained in Leith, tho' only a burgh of barony, in respect of the number and worth of the houses, which otherwise is only allowable within royal burghs. Hadd. 16. Nov. 1611. Waddel.

ACTION for violent profits was found only competent to one who really occupied and was in possession. Col. July, 1582. *In an ejection.* Dametston.—In case of violent possession, the libelling of all profits that might have arisen from goods pastured on the ground, such as lambs, wooll, butter, cheese, &c. was sustained, tho' no such goods were spulzie'd from the pursuer, nor had he any on the ground. Mait. 13. Dec. 1552. Rankellor.

I N a process of spulzie, the Lords found, That the profits are to be restored which the pursuer might have had from the day of *In a spulzie.* spoliation to the raising of the summons, and not to the day of pronouncing the decree. Balf.

B. 3.

(Spulzie.)

(*Spulzie*) 23. March, 1530. Yester.—Found, That the highest profits may be libelled as in a *spulzie*, altho' there was no violence done, but only cattle put in to graze without liberty. Mait. 23. July, 1551. Col-dingknows.—In an action of *spulzie* of labouring goods, the Lords found, That if the pursuer have laboured his lands, as formerly he was in use to do, after committing the *spulzie*, he can have no action for the profits. Balf. (*Spulzie*) 17. Jan. 1563. Elisabeth.—A party having stopped pan-wood from coming to another man's salt-pan, and the pursuer having libelled extravagantly, *viz.* the loss of so much salt daily, besides the coals; the Lords found the libel relevant, but reserved the modification of the profits to themselves. Col. 22. July, 1580. A Clerk in Dysart.—In a *spulzie* of a caldron and still-pot, the Lords allowed the browst and expence of the suit in name of damage, but not the rent of the brewery as laid waste, and the loss of the pursuer's trade by the *spulzie*, nor yet the price of brew-looms that fell down for want of use, nor of malt spoiled for want of the caldron to brew in. Forb. 5. Feb. 1706. Ker.

V I R T U A L.

Virtual Affignation.

A PARTY, in his son's contract of marriage, having warranted the lands to be free of teind, except a certain number of bolls; this was found to be a virtual affignation to a tack of teinds in the disposer's person, so as to prefer the son, in competition with a posterior assignee, who acquired the said tack from the father for onerous causes; tho' it was alledged, That the warrandice, in the contract of marriage, was but of the nature of a personal obligation, binding indeed upon the granter, but not equivalent to an absolute right formally constituted. Dur. 20. March. 1629. Finmquith.

Wimmouth.—But in a case where the teind-sheaves, payable by the respective heritors, were assigned by the tacksmen in security and payment of a debt, this was only found a personal right, tho' clad with possession, and a posterior assignee to the tack itself was found preferable, as being the only real right. Dur. 15. March. 1628. Blantyre.

A MAN having in his person a disposition to a tenement, with procuratory and precept without investment, provided his wife to the mails and duties of the tenement during her life. This assignation to the mails and duties was found to imply a conveyance of the husband's right by disposition; upon which footing the relict was preferred to a creditor, who adjudged the tenement after the husband's decease, and charged the superior. Fount. Dair. 3. Jan. 1699. Muir.—Assignation to mails and duties, "for the present term, and in time coming," imports an absolute right to the lands: and therefore the cedent was found able to dispoise in a legal form with procuratory and precept, *quia concessio jure conceduntur omnia sine quibus explicari non potest*. Stair, Dirl. 2. July, 1667. Sinclair.

A CREDITOR having, upon the back of his bond, addressed the debtor in the following terms, "I desire you may transact the inclosed bond with the bearer James Hunter in his own name;" and having delivered the bond, but dying before a new bond was taken in James Hunter's name; this was found to be no viable transmission of the bond, and so the relict was found entitled to her half thereof, in virtue of her contract of marriage, by which she was provided to the half of all debts and sums of money that should belong to the husband at the time of his decease. Bruce, 11. June, 1715. Farquhar.

LANDS being sold with the consent of a creditor, whose right was preferable upon that subject, as well as upon the other lands that remained with the seller; and the purchaser insisting against this creditor to communicate his debt and diligence to him the purchaser, in order to protect him against the diligence of other creditors, the defence was, That consent in this case imports only a *non repugnantia*, and not a conveyance.

It was admitted, that the consent of a proprietor or creditor, to a disposition of the whole subject affected by his right, is a virtual conveyance, for he can have no interest to withhold his right, after he passes from all claim to the subject; but where a part is only disposed, a consent can imply no more than a *non repugnantia*, seeing it is of use to him to reserve his right *quoad* the subject not disposed. Found, That the consent in this case imports no more than a *non repugnantia*. 11. Dec. 1739. Buchan.

Virtual Confirmation.

ONE having apprised an infestment, which was null for want of confirmation, and being publicly infest upon his apprising, the charter of apprising, which passes of course, was not found equivalent to a confirmation of the original infestment. Stair, Gilm. 16. Jan. 1663. Tenants of Kilchattan.—The like; Stair, 9. Dec. 1668. Earl of Argyle.

Virtual Discharge.

A DECREE-ARBITRAL, ordaining to discharge, is equivalent to a discharge *etiam quoad* the assignee. Hope, (*Arbitration*) 10. Dec. 1623. Elphinston.—A bond to discharge a reversion, was found equivalent to a discharge, in prejudice of a third party. Hope, (*Wadset*) 25. Nov. 1626. Turnbull.—A bond was found discharged by the acceptance of a posterior security in satisfaction thereof. Dur. 6. Dec. 1632. Chisholm.

Virtual Precept of *Clare constat*.

AN apparent heir of a vassal, in place of taking a precept of *clare constat*, and infesting himself thereon, did directly resign in the superior's hand, who granted charter.

charter to him as heir to his predecessor, upon which charter he was infeft: This was found sufficient; for tho' the instrument of resignation was ineffectual, yet the charter following thereon to the resigner, *qua* heir, was virtually a precept of *clare constat, & utile per inutile non vitiatur*. Stair, 20. Jan. 1666. Renton.—

But a father having infeft his son base, and after the son's death, having directly disposed the same lands to his grandson, apparent heir therein; this was found not equivalent to a precept of *clare*, to carry the right that was in the son's person. Home, 26. Jan. 1726. Clydesdale.

Virtual Procuratory.

A PARTY got a disposition from one who was only apparent heir, and the writ wanted a procuratory to infeft him; whereupon the party applied to the bailie of the burgh to cognosce his author heir, and then to infeft them both; but he refused, and being instrumented thereon, the party alledged, that the general clause, "To do all that was necessary in the premises," &c. supplied the procuratory; but another thereafter presenting to that bailie a disposition to the same subject, and containing a procuratory, whereupon the bailie actually infeft him; the Lords, in a competition between them, preferred the posterior disposition, because it had the procuratory, which the other wanted, otherwise the requiring the bailie would have been equivalent to an infeftment, had it not been for the want of that step in the progress. Fount, 16. July, 1708. Williamson.

Virtual Substitution.

ANY declaration of a deceased's intention is sufficient to establish a substitution in a tailzie, to have, at least, the force of a *fidei commissi*. so as to oblige the heirs at law to make the substitution effectual, by granting a direct conveyance. Home, 13. July, 1722, Kennedy.

Virtual

Virtual Tack.

IN a process of removing, at the instance of a singular successor, the tenant excepted upon the former proprietor's holograph rental book, wherein he was inserted as rented during his life, and offered to prove, That by the custom of the barony, this was understood to be equivalent to a formal rental. The defence was repelled; for tho' this might bind the master, it was no obligation on the tenant to continue in the farm for life; and so, not being a real right, could not be good against singular successors. Dur. Hope, (*Rental*) 5. July, 1625. Ayton.

A WADSET being only personal by contract, and without charter and sasine, and bearing a clause, *That it should not be lawful for the heritor to redeem, till so many years elapsed*; yet this was not found to be of the nature of a tack, and so not found sufficient to defend against a compriser, or any other singular successor. Dur. 25. Nov. 1628. Hill.

OBLIGATION to grant a tack, if a virtual tack: See *Obligation*.

VIS & METUS.

In deeds elicited from a woman vestita viro. A WIFE having consented to the alienation of her liferent-lands, and tho' she did not judicially ratify it, yet the Lords found, That she could not reduce, *super reverentia maritali*, unless she libel *verum & justum metum*. Hadd. 16. June, 1613. Hepburn. Harc. (*Stante Matrimonio*) Dec. 1683. Marishall. Fount. 16. July, 1696. Leishman. Fount. Forb. 28. June, 1706. Hay. —Neither

Neither was *reverentia maritalis*, joined with *luctus et meror*, found relevant, the deed having been granted by the wife, while her husband was upon death-bed. Gof. 10. Stair, 24. Jan. 1674. Murray.—One being bound in his son's contract of marriage, to provide the wife in a jointure, her discharge of the same was not sustained, being presumed done *ob reverentiam maritalem*. Dur. 9. Jan. 1623. Marisball.—A wife, who was conjunct fiar, having consented to a wadset of the lands set by her husband; and, after his decease, having raised reduction *ex capite metus*, and libelling for beating, expelling the house, &c. the same was found relevant and sustained, it being *specificce* libelled, as was found requisite, that she suffered the above maltreatments for refusing her consent to the alienation; and this, tho' at the time of her subscription she shewed no repugnance; and tho' the onerous purchaser was neither partaker of the violence, nor knew thereof. Dur. 27. June, 1632. Cassie.—A wife, who was proprietrix of some shops in a burgh, having disposed the same with her husband's consent 24 years ago; and now having raised reduction thereof, as granted *ob metum* of her husband, she never having ratified, and it appearing by the witnesses who deponed, that she seemed backward to subscribe; and that the husband frowned upon her, and kept her seven hours in a tavern before she did it, and pulled her by the coats, &c. The Lords all agreed, That much less force would repose a woman against a deed than a man; but then they thought, That the qualifications of force proved were not sufficient, especially, where the action was brought at such a distance of time; and therefore assilzied. Fount. 29. June, 1708. Johnston.—A reduction at a woman's instance, who had consented to an alienation made by her husband of her liferent-lands, and which she had revoked after her husband's decease, was sustained *super capite metus reverentialis*, notwithstanding she had ratified the infestment by her oath given in judgment. Hadd. 17. June, 1612. —A renunciation by a wife of her conjunct-fee-lands, and judicially ratified in terms of the act parl. 1481, cap. 83. found not reducible *ex capite metus*, tho' it was pleaded, that

that the ratification was also extorted *per eandem vim & metum*. Dur. 8. July, 1642. Grant.

A DISCHARGE of an obligation granted by a man in prison or captivity, was found null by exception. Balf. (*Obligation*) 4. July, 1555. Craig.—That which is given by a person in ward, to him at whose instance he is imprisoned, is presumed to be given *metus causa*; and therefore it may be repeted. Col. April,

1586. Love.—A bond granted by one in prison, to the person upon whose diligence he was imprisoned, will not be sustained, except in so far as the onerous cause can be instructed; unless it appear that the creditor gave an abatement, and that the bond was truly granted upon a transaction; in which case, the bond will be sustained *in totum*, the transaction inferring a presumption, that the thing was done freely, without coercion. Stair, 18. Feb. 1680. Burnet.

A PERSON being taken and detained *in privato carcere* for some time, and thereafter upon a caption detained prisoner, and, in that condition, transported to divers places in the night time, and threatened with long imprisonment, and in the

end being thereby prevailed upon to dispoſe ſome lands; the Lords found the libel and qualifications of force relevant. And there being a defence propoſed, That there was no *damnum*, the party, by an antecedent minute, being obliged to diſpoſe the lands; the Lords repelled the ſame, and would not allow that point of fact to be tried. Dir. Stair, 10. Jan. 1677. Stewart.—A man being treacherouſly taken by ſor- ners and out-laws, and kept in cloſe captivity, under fear of his life every hour, tranſacting with one of them, to give him bond for a ſum, and promiſing the ſame upon oath, he always procuring his eſcape; which being accordingly performed with the hazard of the ſorner's life, who alſo made his own eſcape with him; and the party within a few days thereafter giving him his bond for the ſum promiſed, and afterwards paying part thereof, and renewing the bond for the balance: upon a charge given him on the new bond, and

and a suspension upon the reason of *vis & metus*, and the *turpis causa* of the bond, the reason was repelled, and the bond sustained, because the charger had hazarded his own life in helping to set the suspender at liberty, and fled away with him. Dur. 12. Feb. 1642. Grant.

A DEBTOR, being apprehended by caption, gave bond of corroboration of the debt, obliging himself never to suspend the same, this not being *injustus metus*, the bond of corroboration was found valid; and therefore, the debtor suspending upon compensation, it was not sustained, tho' the compensation was otherwise unquestionably relevant. Stair, 28. June, 1672. Murray. — A similar case; Stair, 2. Dec.

Deed granted while the party is under a formal caption; And, imo, Corroboration, or further security of the debt.

1675. Thomson. — Upon a decree recovered by a minister against his heritors, for a certain sum paid out by him for repairing the manse; one of the heritors being taken with caption, gave bond for L. 80 Scots, as his proportion. In a suspension upon this reason, that he was over-rated, and that his proportion, according to the valuation of the parish, would not exceed a third part of that sum; the Lords found the letters orderly proceeded, because the caption was a lawful diligence, and granting the bond was a transaction. Stair, 22. Jan. 1667. Mair. — A bond granted in corroboration of a decree in absence, when the party was under caption upon that decree, was found no homologation of the debt, in case the bond was for the whole sum contained in the decree; but otherwise, if he got an abatement. Stair, 3. July, 1668. Rue.

— The like; Harc. (*Homologation*) July, 1688. Whiteford. — A decree upon the passive titles having been taken out against a minor *indensus*, and after majority he having been taken with caption for payment of the debt, and having granted a bond of corroboration; in a suspension of the same it was objected, that tho' the debt might be just, the suspender was not liable upon the passive titles; the decree was in absence, and the bond of corroboration was granted without abatement, and must be presumed extorted *metu*

carceris. It was answered, The presumption must rather lie, that the suspender granted the bond of corroboration, as being conscious that he was liable upon the passive titles, when he had so easy remedy against the diligence, by a suspension of the decree in absence, before the caption was put in execution, or by a liberation afterwards. The Lords found the letters orderly proceeded, and that *metus carceris*, by a legal execution, which could have been prevented, was no *justus metus*. Dalr. 3. Fount. 7. Dec. 1698. Ker. — The like; Fount. 9. Dec. 1698. Rutherford.

A TENANT being under caption for his rent, the Lords found, That whatever was done in relation to the grounds of the caption, could not be said to be done *ex vi & metu*; yet that the following extrinsic deeds, elicited from the poor tenant, viz. a disposition of his whole moveables for security of the

rent for the years to come, and an obligation to find a cautioner, were null, as being *vi & metu* extorted while he was under caption. Falc. 29. Nov. 1681. Home, March, 1682. Heriot. — A party under caption, and at the tolbooth door, having granted a bond of corroboration, and likewise a discharge of a decree he had against some of the charger's tenants, the Lords, in a suspension, found, That whatever security he gave for the debt contained in the caption on which he was taken, the same could never be unravelled, *ex capite vis & metus*, as being legally done: but to extort a discharge of an extraneous debt without an onerous cause, they found utterly unwarrantable, and reducible *ab vim & metum*. Further, as to the discharge the charger having offered to give it back, they found that the doing so was not sufficient, unless he also procured a consent from the tenants, and if not, then they ordained the sum in the discharge to be deducted off the bond charged on. Fount. 18. Dec. 1708. Nisbet.

A CAPTION having been irregularly put in execution, after the debt was suspended, and the debtor, in virtue thereof, being dragged out of his house by an armed force, and carried to a remote place,

Deed granted where the diligence is ir-

bond of cautionry granted in these circumstances by the debtor's sons, to have, for any thing they knew, their father's life, was found null. *Stair, Gof. 8, Dec. 1671. McIntosh.*—A sheriff-depute having fined an heritor for divers absences from head-courts, and having summarily poinded the tenants for the amercement, the Lords thought that this procedure was precipitate, being without a previous decree of poinding, and without deciding whether these unways were *debita iudi*, they found the poinding illegal, and the bond granted to stop it, null, and reported the matter and tenants to their defences. *Pount. 18, July, 1700. Dundas.*

THE Lords reduced a resignation *ad remanentiam* of an Earldom, only because, upon the Earl's refusal to resign, the King had commanded him to prison at a good distance from his dwelling. *Other qualifications of force and fear.*

1. April, 1543. Morton.—The exception of *metus*, was sustained upon no stronger qualification than bolsterous words, the power of the party and other circumstances justly moving the defender to yield for eviting present danger. *Hadd. 1. Feb. 1606. Vinfra.*—In a reduction of a disposition of lands upon the head of concussion, the Lords sustained the following condescendence as relevant, that the defender was then a Lord of Session, and otherwise known to have been in great power; that he had raised an imprecation of the pursuer's rights, and when production was made, that he had taken up the papers, and refused to return them; that he had entered the possession even before he got the disposition; and lastly, that it was *lesse ultra diplom.* Our author adds, That the Lords had in view to discourage great men from oppressing their poor neighbours. *Pount. 2. Feb. 1688. Gray.*

W A D S E T.

LANDS being disposed for security of a sum definite, "declaring the same redeemable upon payment of the

Proper and improper.

"principal and annualrents that should be resting." This was found an improper wadset, because here there was no *anticresis*, that is, the rents were not to go in place of annualrent, but the wadsetter bound to account for his intrusions. Dir. 8. Dec. 1666. Urquhart.—In a bond for borrowed money, there being a clause wadsetting certain lands "to be possessed by the creditor for the annualrent of the sum, so long as the sum should remain unpaid." This was found a proper wadset, and consequently that the wadsetter had no claim for annualrent, tho' the yearly profits of the land fell short thereof. Dir. 17. June, 1675. Heckford.

A WADSETTER cannot set *Wadsetters power*, tacks to endure longer than his *of setting tacks.* own right. Mait. 25. Feb. 1567. Home.

IT being provided by act 62. parl. 1661, "That if the debtor shall give sufficient security to the wadsetter for payment of his annualrent, the wadsetter shall quit his possession, or if he retain the same, that he must account for the profits;" and, in terms of this clause security being offered, the wadsetter who continued to possess, was found liable to account from the time the offer was made, tho' the process for payment of the surplus rents, over and above the current annualrent, was not raised for several years thereafter. Gos. 16. June, 1671. Lovat.—But wadsetters are not accountable for any profits that arise before the date of the offer. Stair, 21. Feb. 1666. Borthwick. Stair, *ead. die.* Ogilvie.—In order to restrict

strict the rents of the wadset to the annual rent, security must only be offered for the annual rent, the investment being a sufficient security for the *fori*. Harc. (Wadset) March, 1683. Marischall.—But it

was not found sufficient that caution was offered in general, seeing a bond was not offered with a cautioner, or indeed any particular cautioner condescended on at N. Pount. 18. July, 1694. Ramsay.—In the above act towards the close, it is provided, "That wadsetters, who are in the natural possession, shall not be bound to remove even after security is offered, until they be also warned, in ordinary form, 40 days before Whitunday." Upon the footing of

this clause, a wadsetter, in the natural possession, was foizied from compting, as he was not warned after the offer of security was made to him. Stair, 20. Feb.

1679. Brute.—In the like case, the Lords considered, that there were two cases presupposed in this clause; one, where the wadsetter, willing to yield possession, accepts of the offer of security; there his acceptance puts him upon the footing of a tenant, to remove whom, warning is necessary: the other case is, where the wadsetter refuses the offer, choosing rather to continue in possession: here warning would be to no purpose; and therefore, they found a wadsetter, who, by refusing the offer of security, declared his intention of retaining possession, was liable to account, tho' he was not warned. Forb. 21. Pount. 26. Dec. 1710.

Seven.—During the dependence of a compt and reckoning upon a wadsetter's intromission, who continued in possession after the offer of security, the reverer, apprehensive that he was overpaid, insisted that the wadsetter being *operatus*, ought either to give security for the sum that should be decerned against him, in the event of the compt and reckoning, or cede possession and take security for what should be decerned in his favor. The Lords refused obliging him to do either; for they considered that this was a correctory law, and could not be extended. Pount.

2. Jan. 1697. Marischall.

THO', when a man alienates lands to be holden of himself, he needs no new fine after redemption, because he remains in the radical right; yet if the alienated lands be holden of the reverser's superior, the Lords found, That he must be again infeft upon redemption, unless the same be taken as holden of the superior by comprising; because, in that case, the proprietor redeeming within seven years, needs no new fine, the law presuming him to have remained still seised when he redeems within the legal. *Mait. 10. Feb. 1569. Maxton.*—In a declarator upon an order of redemption, the wadsetter's apparent heir appeared, and craved the sum assigned to be delivered to him, alledging the declarator to be a sufficient security to the redeemer, without renunciation or resignation of the wadsetter. The lands were found in this case to be redeemed, but the money was ordained not to be given up till the apparent heir should infeft himself as heir to his father, and resign; for the Lords thought the redeemer ought to be put to no hazard of repetition. *Stair, 10. Jan. 1665. Campbell.*

A **WADSET** being granted, and a backtack thereof set, stipulating, that if the duty was not paid, the wadsetter should enter to the possession, and a declarator, on failure of payment, being obtained, and the wadsetter, having taken possession, it was found thenceforth to become a proper wadset. *Falc. v. I. p. 301. 8. Dec. 1747. Grays.*

EIK to the reversion. *See Personal and Real.*

USURIOUS stipulation in wadssets. *See Usury.*

TACK commencing after expiry of the wadset for a less duty. *See Usury.*

ORDER of redemption. *See redemption.*

APPARENT heir, using requisition, and serving thereafter. *See Quod ab initio vitiosum.*

WADSETTER

W A R D.

31.

WADSETTER must resign upon redemption, tho' not expressed in the contract. *See Implied Obligation.*

WHEN the wadset is lost, and the wadset sum becomes moveable. *See Right in Security.*

IMPROPER wadset, extinguished by intromission, requires not declarator. *See Declarator.*

W A R D.

A CHARTER bearing, *Reddendo servitia debita & consueta*, was found to import service of ward and relief; but where it bore, *Ad formam & tenorem antiquae chartae*, there the original charter was found to be the rule. *Balf. (Holding)* 6. Feb. 1605. The King.

Ward holding understood, where the contrary is not expressed.

—Lands paying *sex denarii argenti nomine canae*, were interpreted to be holden ward. *Hadd.* Feb. 1610.

—A clause of *reddendo* in a vassal's charter being thus conceived, *Reddendo sedecim nummos ad duas annu terminos festo, viz. Pentecostes & sancti Martini, una cum servitiis in curiis nostris & alibi debitis & consuetis*; the Lords found the holding to be ward. *Hope, (Feus)* *Hadd.* 11. Nov. 1614.

—In an action for the double avail of a marriage, the Lords found an infestment conceived thus, *Solvendo octo solidos sterlingos tantum pro omni alio onere, warda, relevio, &c.* relevant to infer a tax-ward, altho' it made mention of no kind of holding. *Hope, (Feus)* 27. June, 1616. *Angus.*—A holding was found to be ward, tho'; besides *servitia debita & consueta*, it expressed a sum of money. *Fount.* 14. Jan. 1696. *Carnwath.*

THE

THE ground cannot be poinded by an annual renter during the ward. Dur. Auch. (*Ward*) 21. March, 1629. Wemyss.—A servitude of thirlage, constituted by a vassal, was not found to prejudice the superior in possession of the lands by his casualty of ward. Stair, 11. Dec. 1666. Cassilis.

TACKS sleep during the ward, but then the tacksmen is entitled to have the time he loses by the ward made up to him afterwards. Mait. 6. Dec. 1570. Cunningham. Hadd. 4. July, 1611. Culter.—In an action for mails and duties at the instance of a donator to a ward against a tenant, found, That a tack in the defender's person, and clothed with possession, was sufficient to exclude the pursuer for any greater duty than what was contained in his tack, for all years preceeding the date of the summons, the defender never having been interrupted before. Dur. Spot. (*Ward*) 13. March, 1627. Ley.

THE lands of a minor, son of an heiress, cannot fall in ward during his father's courtesy. Balf. (*Ward*) penult. Feb. 1553. Gorthie.

TERCE excludes the casualty of ward. Shic. 2. March, 1541. Gourly. Col. 17. Dec. 1577. Glenbervie.

FOUND, That an appriser infest, tho' the ward falls not by his death, but by the death of the debtor, will yet exclude the superior, and be preferable to the donator of ward, just as much as an infestment of annualrent confirmed by the superior, because, tho' infestment be given by the superior in obedience only, yet it is in obedience to the law; and a strong argument was drawn from analogy of the act, allowing ward-lands to be set in feu, which feus, by constant practice, are held to be good against the ward, so that the donator can draw nothing but the feu-duties. 24. July, 1739. Donator of ward.

A LIFERENT infeftment granted to a wife, to be holden of the superior, and confirmed by him, excludes the ward, because the lands are full; which was found competent to be pleaded by the sub-vassals against the liferentrix herself, who had a gift of the ward from the superior.

Dur. 7. July, 1629. Cathcart. Hadd. 25. July, 1623. Hay.

BY statute 20. Geo. II. c. 50. the tenure of all lands in Scotland, by ward holding, whether simple or taxed, and the casualties of ward, marriage, and recognition consequent upon that tenure, are utterly abolished. The tenure of the lands holden ward of the crown is turned into blench holding for payment of one penny Scots yearly, *si petatur tantum*, and the tenure of lands holding of subjects superiors, is turned into feu-holding for payment of a certain yearly rent in money, cattle, or grain, in place of the said casualties and of all services. The court of session is, by the act, authorised to consider the difference in value to the vassals, arising from the change of their holdings from ward to feu, and what constant yearly rent may be a just recompence to the superior for that difference, and to make an act of sederunt upon it, according to which parties are to settle the quota of the feu-duties, and in case of difference, the court is to determine, and whatever they shall so modify to be the yearly feu-duty payable for such lands, in the same manner as if feu-charter had been granted of that date by the superiors to their respective vassals, on the resignation thereof into their hands. Till such modification shall be made, the vassal is to incur no irritancy for the not payment of the feu-duty; and these modifications are to be inserted as the feu-duty, in the future renovation of the infeftments by the vassals and their heirs. In consequence of which, the Lords, by an act of Sederunt, 8. Feb. 1749, established the following rules: In lands that are holden simple ward of a subject, one per cent. of the constant yearly rent is to be paid as a yearly feu-duty on account of the marriage, and one per cent. as the value of the other casualties, incident to ward-holdings; but where the vassal holds other lands ward

ward of the crown, he is not liable to his subject-superior in any feu-duty on account of the marriage. In lands holden taked ward of a subject, two *per cent* of the sum taxed by the charter of the lands, is to be paid yearly as the value of all the castles, whether the vassal holds other lands ward of the crown or not. A doubt having arisen, whether the principality lands, *i. e.* the lands holden ward of the Prince of Scotland, were included under this statute, and in what manner the vassals of the Prince were to be entered? An act was passed 23. Geo. II. c. 20. giving to the king the same powers which had been formerly exercised by the Kings of Scotland over the principality lands, when there was no Prince, in pursuance of which, his Majesty, by warrant under the privy seal, dated Jan. 1753, signified his pleasure, that all lands, which were formerly holden ward of the Prince, should for the future be holden blanch.

WARDATOR of old had the keeping of the pupil. See *Tutor and Pupil*.

WARD, in what cases excluded by the superior's confirmation. See *Confirmations*.

WHEN the ward is excluded by *terce*, *countess*, &c. can this be proposed by third parties? See *Jus tertii*.

WARRANTICE.

A **CLAUSE** of warrantice, "absolute warrantice, in" contained in an assignation of a bond, was found not to extend to the solvency, real and personal debts. Stat. 16. June, 1664. Hay. A clause of absolute warrantice, contained in an assignation to a bond, "warranting the right to be good, valid, and effectual

effectual at all hands," does not import that the debtor was solvent at the time of the assignation, but only that the debt is good in law, and above all exception. Stair, Gof. 24. Nov. 1671. Barclay, — The like, where the assignation not only bore absolute warrantice, but also, that the sums assigned should be good, valid and effectual," because, in general, the solvency of the debtor is never understood warranted, and therefore must be expressed; Stair, 12. Dec. 1671. *Inter eosd.* — The case is a little different as to real debts, in disposing of which the land is understood to be the principal, if not the only debtor; and to say the land is not *locuplex*, is in other words to say, that the debt will be excluded by preferable rights, which comes out of the same, as if the debt were not at all a burden upon the land; and therefore, the Lords found a clause of absolute warrantice in the conveyance of an infestment of annualrent, does import that the same shall be effectual against the land. Dir. 6. Feb. 1675. Burd. — In a suit for the price of an apprising, which, with its grounds, was disposed with absolute warrantice, the defender objected, That the apprising was not a profitable right, the worth of the lands apprising being exhausted by preferable rights and diligences: The Lords sustained the defence, and foilzied. Harc. (*Warrantice*) March 1683. Fife. — But thereafter it appearing, from the assignation produced, that the bond was principally assigned, and the apprising only in consequence, that the apprising lands were not at all disposed, and that the clause of warrantice did not warrant the apprising in special, but only the assignation in general; the Lords found in this special case, That the warrantice did import only *debitum subesse*, because here the personal bond has been principally in view of the parties. Harc. *ibid.* Nov. 1683. *inter eosd.* — Formerly it had been found, That the absolute warrantice in the conveyance of an apprising did only import the formality of the diligence, and reality of the debt. Dir. 10. Nov. 1666. Bowie.

ABSOLUTE

ABSOLUTE warrantice was not found incurred, tho' the lands came to be distressed by a bond of thirlage granted by the seller's author, astringing the lands to the mill of the barony: This was found in the circumstantiate case, because the thirlage was but light, and that it was obvious to the buyer to know or enquire whether the land, being part of a barony, was thirled to the mill or not; but the Lords did not determine that no thirlage could infer warrantice. Stair, Dir. Gof. 21. June, 1672. Sandilands. — One who had disposed lands, being quarrelled upon an alledged eviction, viz. a servitude of casting peats granted by his authors, anno 1625, the Lords assolizied, in respect the servitude was old and notourly known, and an inconsiderable burden, in that part of the country where mosses are frequent. Hare. (*Warrantice*) Home, March, 1682. Paton. — Found, That church-lands, being disposed with absolute warrantice, the disponent is bound to warrant from the designation of a glebe, tho' it was alledged, That *ex natura rei*, and not *ex defectu juris*, the glebe was evicted. Gilm. July, 1663. Elphinston. Dir. 15. July, 1667. Watson. Falc. 20. Feb. 1683. Bonner. — The contrary.

Stair, 1. July, 1676. Auchinail. — Absolute warrantice, in an assignation to a tack of teinds, does not make the disponent liable for a supervenient burden or augmentation of stipend to the minister, because stipend is a natural burden upon teinds. Hare. (*Teinds*) 6. Jan. 1682. Lumisden. — The warrantice of a tack of a house, importing, That there should be no eviction, nor pretender to the property or possession to disturb or dispossess the tenant, was found by the Lords not to extend to a mere accident of a neighbour's building, which, tho' it incumbered the entry to the house, yet did not totally obstruct it. Foulis, 23. June, 1680. Peirs.

WARRANTICE from the cedent's fact and deed secures not from falshood, to which the cedent was not accessory: the assignee must run all hazards, except from the cedent's fact and deed. Stair, 14. Dec.

Warrantice from fact and deed.

Dec. 1678. Dick. — In a minute of sale, the seller having bound himself that neither he nor his heirs had done or should do any deed prejudicial thereto; and the eldest son, long before the minute, in which he was not a party, having disposed to a third party a preferable right he had to the subject, whereby the lands came to be evicted; in a suit against the son upon the passive titles, to make good the father's warrantice the Lords found the warrantice sustained. Dur. 9. July, 1630. Hay. — A charter of apprising being granted by a subject superior, with warrantice from his fact and deed, a clause unusual in charters, when granted merely in obedience to the law; and the superior's heir afterwards challenging the apprising, upon this footing, that the debtor was not proprietor of the lands, but that the lands belonged to the superior, who granted the charter in property as well as superiority; the Lords found the clause of warrantice behoved to have this effect, that the superior or his heir could not quarrel the apprising. Forb. Jan. 1710. Glendinning. — Warrantice, from fact and deed, entitles the purchaser to seek redress of the public burdens due out of the land before the date of his right, tho', properly speaking, not arising from the fact or deed of the disponent, but from his omission only. Gof. 25. June, 1669. Haliburton. WARRANTICE, from fact and deed, adjoined to a disposition *mortis causa*, of all debts and sums of money, does not free the disponent from being liable to the deceased's debts; for a disposition of an *universitas* must pass *cum suo onere*, and the warrantice is only meant to guard against future gratuitous alienations. Feb. 1735. Peacock. — A father disposed his estate to his eldest son, reserving a power, "to burden it with a certain sum for provision to his bairns and other lawful affairs," with a clause of warrantice *from his own fact and deed alienarily*. Notwithstanding of this clause of warrantice, it was found, that this faculty was not exhausted by the father's prior debts, but that both were burdens upon the son; it being pleaded that such clauses of warrantice, contained in gratuitous dispositions, where nothing is intended but to give the right *talis qualis*, are not understood to guard

guard against prior debts, especially in this case, where the father reserved only a life-tenant of part of the land and no more than sufficient for an aliment. *Stair*

11. Dec. 1679. Creditors of Mouswall.

A WIFE having infestment in certain lands for her jointure, to the extent of a particular sum, with infestment of warrantice upon other lands, in case the said first lands should be found less worth than the sum of the jointure, has no right of recourse to the warrantice lands against a singular successor, where it can be proved that the principal lands were, for ten years before, and many years after the wife's infestment worth the sum of the jointure; for it will be presumed, that any decay of rents in such case is owing to the widow's mismanagement, or to some common calamity, by the badness of seasons, against which no warrantice takes place. *Dur. 10. March 1636. Dumnipace.*

NO warrantice being expressed in a contract of alienation of lands, was found to import absolute warrantice. *Col. May 1583. Kinfauns.*—By a minute of sale, one became bound to give a valuable and ample disposition of an adjudication in his person and the other to pay a certain sum for the same: the purchaser raised a reduction of this minute, alledging that the adjudication was informal and null. The Lords found the seller not obliged to warrant the formality of the adjudication. *Pount. 23. Dec. 1698. Bothwell.*—An assignation being granted to a decree bearing for onerous causes, but wanting a clause of warrantice, the Lords found, That this could not be interpreted to imply absolute warrantice, but only from fact and deed, which is the common and natural warrantice inserted in assignations to debts and decrees: for that the brocard, *viz.* Where no warrantice is expressed, absolute warrantice must be understood, can only be applied according to the nature of the right; that is, if it be a sale of lands for adequate onerous causes, then it holds, but not in assignations to personal rights. And here it being further objected

Implied warrantice. *Col. May 1583. Kinfauns.*—By a minute of sale, one became bound to give a valuable and ample disposition of an adjudication in his person and the other to pay a certain sum for the same: the purchaser raised a reduction of this minute, alledging that the adjudication was informal and null. The Lords found the seller not obliged to warrant the formality of the adjudication. *Pount. 23. Dec. 1698. Bothwell.*—An assignation being granted to a decree bearing for onerous causes, but wanting a clause of warrantice, the Lords found, That this could not be interpreted to imply absolute warrantice, but only from fact and deed, which is the common and natural warrantice inserted in assignations to debts and decrees: for that the brocard, *viz.* Where no warrantice is expressed, absolute warrantice must be understood, can only be applied according to the nature of the right; that is, if it be a sale of lands for adequate onerous causes, then it holds, but not in assignations to personal rights. And here it being further objected

The

that even such a warrantice should, at least, import
debitum subest, whereas here there was no debt at
 the debtor, on his being reponed to his oath, de-
 claring negative; yet this was not regarded, because,
 in granting the assignation, there was a decree stand-
 ing, tho' afterwards annulled, & *sententia judicis pro
 ratate habetur*, till it be reduced and taken away.
 Jun. 4. March, 1707. Riddel.—Warrantice from
 deed and deed is implied, even where the assignation
 is a pure donation. Hope, (*Warrantice*) 9. Jan. 1621.

—An assignation made to all right and title
 the cedent has to teinds containing no warrantice, tho'
 be for onerous causes, will not oblige the cedent to
 warrant a null tack made to him of the said teinds, the
 tack not being made mention of in the assignation.
 Add. Hope, (*Warrantice*) 13. Feb. 1612. San-
 thar.

IT was found, That ward, relief, and nonentry,
 are not understood to be comprehended

under general warrantice, but must be *Warrantice*
 specially expressed, because these casu- *against the ca-*
 alties belong to the superior by the *sualties of su-*
 w of the land, from which no man is *periority.*
 attempted, and ought to be so known by

the lieges; and therefore, *sibi imputet emptor*, who
 took not care to have the warrantice special. Balf.
 (*Warrantice*) 28. May, 1549. Dencinan.—A wad-
 datter of ward-lands having deceased, and his heir hav-
 ing procured the gift of his own ward; the Lords
 and the reverser was not liable to warrant against
 his casualty, not even so much as to refund the com-
 mission paid for the gift. Harc. (*Ward and Marriage*).

Feb. 1687. Agnew.—A superior being bound
 to warrant his vassal against wards *per expressum*, this
 was found only to comprehend wards already fallen.
 Air, 15. Feb. 1665. Boyd.—In *feu contracta*
 there was a special clause, "That because the granter
 held the lands ward, therefore he obliged himself
 to relieve the feuers of any ward that should fall in
 time coming;" the granter of these feus having
 hereafter alienated his superiority, and the lands fall-
 ing in ward, by the death of the singular successor,
 the clause of warrantice was found to be incurred.

Here it was argued for the granter of these feus, That he had obliged himself in that clause of warrandice only *qua* superior; and he being denuded, the obligation ceases of course. Stair, 1. July, 1668. Colquhoun.

THE casualty of marriage never understood to be warranted against; and therefore, a feu vassal, whose right was after the act 16. parl. 1633, being pointed for the avail of his superior's marriage, was found entitled to no relief. Harc. (*Ward and Marriage*) Jan. 1686. Buntin, &c.

TACKS do not fall under a clause of warrandice, unless the clause be expressed to that purpose. *Against tacks.* Balf. (*Warrandice*) 14. March, 1565. Simpson:—A woman being provided in her contract of marriage to the liferent of lands, which long before had been set in tack for small tack-duties; in a process against her husband's heir, the Lords found the warrandice not incurred, seeing tacks were not guarded against *specifics*. Dur. 19. June, 1629. Pittierren.

ABSOLUTE warrandice, in a sale of lands, found not incurred by a partial eviction of the property, which happened upon a supervenient law, being a designation of part of the land to the minister for grass, in terms of the 21. act, parl. 1663. Stair 12. Dirl. 15. July, 1667. Watson.

—A Lady, in her contract of marriage having, in name of jointure, got a right to teinds, which the husband was obliged to uphold according to a rental specified in the contract; and two chalders of the teinds being evicted from her, by the commission of parliament, to augment the minister's stipend, the husband's heir was found liable in warrandice, tho' the eviction was upon a supervenient law, because of the express tenor of the clause of warrandice. Dur. 28. July, 1635. Cardross.—In the like case, the husband having inset his wife in lands, flock and teind, which he obliged himself should be worth to her twelve chalders of free victual, his heir was found liable to relieve her of the annuity imposed by the commission of teinds, tho' this was by a supervenient law, in re-

WARRANTICE.

41

ward the lands were not worth twelve chalders, over and above this burden. Dur. 7. July, 1637. Ballegno.

WARD lands being recognised in default of the buyer, who took sasine before he obtained the superior's consent, this was found not to be a distress against the seller, tho' he was obliged to insert the purchaser as freely as he was himself. *Eviction happening by neglect of the purchaser.* Hadd. 1. Feb. 1610. Otterburn.

He who has a tack of teinds set to him for 19 years, and his entry to be at the date of the tack, not apprehending possession thro' his own default during his lifetime, his heir will not get warrantice against the settler or his heirs, but only for the years that the settler or his heir uplifted the teinds. Hadd. 27. June, 1612.

—A person having granted a tack of teinds with warrantice, and thereafter another tack of the same teinds to another person who attained possession; the Lords sustained action of warrantice against him, at the instance of the first tacksmen, altho' the want of possession was owing to the pursuer's own neglect; but the defender was not admitted to make this allegation, who had granted double rights. Dur. 6. March, 1623. Hamilton. — The like was found, where a party had granted double rights of lands. Fount. 2. Feb. 1710. Hepburn.

LANDS which were sold with warrantice, from fact and deed allenarly, being evicted, but not thro' default of the disposer, the purchaser brought an action, not upon the warrantice, which was not incurred, but upon this ground of equity, That, if he has lost the land, he ought at least to have repetition of the price. It was answered, That *If upon eviction the warrantice is not incurred, there can be no repetition of the price.*

When one sells, with warrantice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrantice, but only to sell it so as the seller himself has it, that is, to sell what title and interest he has in the subject, the purchaser takes upon himself all other hazards; and therefore, if eviction happen otherwise than thro' the

fact and deed of the disponer, he bears the loss. The Lords alloilzied. Jan. 1732. Craig.—The same was found with regard to a conveyance of a personal bond, to which the cedent himself had right by progress. Forb. MS. 11. June, 1714. Ross.

TO found an action of warrantice, it was found sufficient, that the purchaser acquainted the seller of the depending process of eviction, tho' a formal instrument was not taken. Nicolson, (*Suspension*) 6. July, 1620. Lyon.—Warrantice was sustained, tho' the eviction was not intimated to the person bound in warrantice, unless he could instruct a relevant exception that might have defended against the eviction. Stair, 23. June, 1681. Clark.

IN a sale of teinds, with absolute warrantice, it was found, That the teinds were affected with a certain locality to the minister: and the purchaser thereupon, insisting in an action of warrantice, it was objected, that there was no legal distress, but voluntary payment made to the minister of every years locality since the purchase; which was repelled, seeing the distress was unquestionable, and therefore payment made without process prejudged not. Stair, 4. Feb. 1662. Melvil.

IT was found, That a simple decree of reduction, upon an inhibition for not production, was no sufficient distress to infer recourse, seeing the party ought to have produced and defended, because there might be nullities in the execution of the inhibition. Fount. 13. March, 1695. Ferguson.

—Lands being disposed by a vassal, with consent of his superior, and both of them being bound in warrantice to the buyer in general, and also specially bound to warrant against a prior comprising and inhibition, the Lords ordained, in an action of warrantice, the superior to purge the said rights, altho' the changer was not troubled in his possession, seeing the same were such rights as might prejudice his brinking, being prior

to him, and that the comprising, whenever saline should follow, would make him comptable for the mails of the lands since the date thereof: only their Lordships superseded execution to a certain day, that between and that time the superior might remove the impediment. Dur. 1. July, 1624. Frendraught.—Found, That dependence of a process against lands excambed, was a distress, so as to found an action of recourse; but execution upon the decree of recourse, was superseded till the lands were distressed by sentence. Gilm. 1. Jan. 1663. Home.—A man having granted double rights to the same subject, the eldest whereof reserved his own and his wife's liferent, but with absolute warrantice; the Lords sustained a charge for the warrantice, altho' there neither was nor could be a present distress, because of the reservation aforesaid: for the Lords found a difference when warrantice is prayed upon a deed of the party obliged, and upon any other ground; and that, as to his deed, he may be charged to purge it, without necessity to alledge a distress. Stair, Dir. 17. July, 1666. Burnett.—Recourse was sustained upon a clause of warrantice, for satisfaction of the pursuer's prejudice, tho' there had not happened any actual eviction, the cause inferring eviction being evident and clear, and occasioned by the deed of the party warrantier, who granted double dispositions. Gos. 14. Stair, 17. Feb. 1672. Smith.—In an action of warrantice against a person who had granted double rights, the Lords decreed in warrantice, but this only *declaratorie juris*, so as no execution was to pass against the defender till a decree of eviction was obtained against the pursuer. Fount. 1. Feb. 1710. Hepburn.

ONE having sold an apprising with warrantice from his own proper fact and deed, and That the sums were truly due, *Warrantice* induried, how ing and owing, the apprising being *far extended?* afterwards found null, and the warrantice incurred, but without any fraud or fault of the dissoner, the warrantice was only extended to a repetition of the purchase-money *cum omni causa*, not to the sums in the apprising. Stair, 28. Feb. 1672. Argyle.

—In a case of contravention of warrantice of a disposition to a wadset of 11,000 merks, by granting another disposition, which inferred double alienations, the Lords modified 20,000 merks of damages. Fount. 10. June, 1687. Smith. — In eviction of whatever subjects, rights in security, lands, &c. the recourse upon warrantice is not restricted to the sum paid for the purchase, but reaches to the real worth of the subject evicted, as it is at the time of the eviction. Home, 22. Feb. 1717. Houston.

A PURCHASER insisting for possession of the warrantice-lands, the principal lands being partly evicted by a wadset, he was found to have access to the full rent of the warrantice-lands, applying the surplus, more than the annualrent of the wadset-sum, for payment of the principal. Gof. 21. Stair, 22. July, 1675. Menzies. — The like; Hadd. 27. Jan. 1604. Bruce.

—There being a depending process of poiding the ground upon an annualrent-right, against which the purchaser was specially warranted; and he insisting against the seller, either to purge the incumbrance, or that a sum should be modified by the Lords, as the true worth and value thereof, whereupon he might comprise for his relief; this conclusion, tho' a novelty, was found relevant. Auch. (Annualrent). 25. Dur. 26. June, 1635. Grieve.

AN infestment of warrantice was found to give a real right in the warrantice lands, not only to the extent of the value of the principal lands at the time of eviction, but to all the pursuer's damages, arising before or after the eviction, without any fault of the pursuer. Home, p. 293. 6. Nov. 1741. Blair.

PURCHASER transacting the ground of eviction, what claim he has against his author bound in warrantice. See *Mutual Contract*.

WITNESS

W I T N E S S E S.

IN an exhibition of a bond, the Lords received witnesses who were seconds of kin to the pursuer, *peritatis rimanda causa*. Hope, (Witness) Feb. 1611. Gawa.— *If relations can be witnesses.* And, imo, To what degree rejected? The Lords received a witness who was second of kin to one of the parties. Hope, (Witness) 26. Nov. 1611. Dothlan.— But a cousin-german cannot regularly be admitted, nor a brother-in-law; which last was found, tho' the party's sister was dead who made the tie between him and the witness. Stair, 15. Jan. 1679. Brown.— A person who was a subscribing witness to a disposition granted in favor of his nephew, quarrelled *ex capite secti*, was refused to be admitted as a witness for the nephew, to prove that the disponent was in *lige possie* when he granted it. Forb. 19. June, 1713. Creditors of Orbieston.— It being objected, That one of the adducer's witnesses could not be received, as being his uncle-in-law, the Lords repelled the objection. Bruce's MS. 30. Nov. 1716. Moncrief.—

IT was questioned, whether a bastard could be a witness for his kinsman, because the law makes him no blood-relation; yet, on 2do, *Bastards*. the other hand, experience teaching, that they commonly bear as strong affection as children lawfully begotten; therefore in a case where there was no *penuria testium*, the Lords refused to allow such a person witness for his kinsman. Hadd. 6. Nov. 1610. Leyes.— The like; Hadd. Dec. 1610. Aikman.— A bastard allowed to be examined as a witness for a kinsman on the father's side, because the father of a bastard is understood in law to be uncertain. Dur. 6. Nov. 1624. Bonnington.— Found, That a bastard, who is of kin by the father's side, may

may be received as a witness, as not being at all of kin in the construction of law; but that he may be repelled if of kin by the mother's side, she being always certain. Hadd. Ersk. 22. Nov. 1622. Grant.

THE Lords rejected a witness, adduced at the instance of several parties who had a joint interest, being son-in-law to one of them, tho' he was not related to the others. Fount. 26. Feb. 1685. Erskine.

THO' a party was not the pursuer in a cause, but only solicitor and maintainer thereof, and managed it on his own charges; yet those within the degrees to him were repelled as witnesses. Sinc. 16. May, 1542. Dobie.

IT being objected against a witness, in proving the tenor of a charter, That he was brother to the receiver of the disposition, who, tho' he had absolute warrandice, yet did not desire to lose his policy and planting, or to be put to recur on his warrandice; the Lords rejected the witness. Fount. 12. Feb. 1686. Douglas.

WITNESSES, within forbidden degrees to a pursuer, were repelled, tho' they were in the same degree to the defender. Sinc. 16. Feb. 1542. Dickson. Balf. (Witness) 16. Feb. 1541. Gibson. Hadd. 9. Jan. 1616. Maidland.

An objection being made against a witness, That he was of kin to the adducer, and it being replied, That he was nearer of kin to the defender; the exception nevertheless was found relevant. Hadd. Feb. 1609. Kinross. Hadd. 22. Nov. 1622. Grant. Hope, (Witness) June, 1610. Lochleven.

IN a process of adherence before the commissaries, the pursuer's brother, with her sisters and their husbands, were admitted *committis* to prove *nota*, to prove the marriage, for this reason, That as private marriages are not put *extra commercium*, no witnesses can

can well be depended upon but the nearest relations; upon which a bill of advocacy, presented to the Lords, was refused. *ult.* July, 1732. Barber.

A WITNESS being adduced upon a fact done *tempore pestis, quando erat penuria testium*, and the witness being *omni exceptione major*; 8vo, *Ubi est penuria testium?* the Lords received him *ex officio*, tho' he was uncle to the party adducer.

Hadd. *penult.* May, 1610. Inglis. — The Lords refused to receive near kinsmen as witnesses, except where there was *penuria testium*, and great appearance that for want of probation the cause would perish; in which case, they ordained the party to give his oath in presence of those who knew the matter. Hadd. 11. Jan. 1611. Dalgleish. — In a reduction on minority, the pursuer's mother was received witness of the pursuer's age, *cum nota*, there being a testificate already produced, and 30 or 40 years since the pursuer's birth, which would occasion a *penuria testium*; but she was ordained to depone who were witnesses at the birth and baptism, and these to be examined. Stair, 19. Dec. 1666. Thomson. — Witnesses, who were uncles and cousin-germans to both parties, were admitted in proving the tenor of a latent writ, which fell only to have been seen by near relations. Gof. 22. July, 1668. M'Kenzie. — A brother-in-law and cousin-german were admitted *cum nota, ubi erat penuria testium*. Stair, 15. Jan. 1679. Brown.

THE Lords repelled a witness, as being within the forbidden degrees of propinquity to the adducer, altho' the other party had before adduced him: for tho', when he was formerly adduced, it was competent to put cross interrogatories to him, yet if that was omitted, it was now no more lawful for his relation to adduce him as a witness, than if he had never been adduced by the other party. Fount. Forb. 24. Nov. 1709. Monteith.

A CURATOR *ad negotia* can be neither judge nor witness in the minor's cause, altho' the minor have also curators *ad litem*. Mait. 17. March, 1555. Lethington. — In a question,

9no, Admitted against the party he is related to.

Other connections between

Witness and party. question, whether a tutor could be admitted witness to prove the passive titles against a party, when his own pupil had the like action on the passive titles; the Lords resolved it in the negative, except *in penuria testium*, and then only to be received *cum nota*. Fount. 18. July 1678. —

A man who had got a woman with child, having thereafter at a communing with her friends, promised to pay a sum of money to one of them for her behoof, she being on the other hand to give him a declaration, That he was under no promise of marriage to her; the Lords found, That this was not a naked promise, but of the nature of a bargain, and therefore probable by witnesses. And it being objected against that friend to whom the money was promised for her behoof, That he being a party could not be admitted, the Lords nevertheless admitted him as a competent *habile* witness, he being a communer, and so the fittest person to declare the terms. Fount. Forb. 26. June 1706. Anderson.

— In a process for a verbal injury committed against a magistrate, sued after he was out of office, his colleague, who fined the offender for that injury, being also exauctorated, was admitted as a witness for the pursuer. Forb. 18. Nov. 1712. Tod.

A WITNESS having been refused to be received by the Lords, because he was the adducer's bollman, and consequently a removeable servant, and thereafter the adducer dismissing him from his service, and then again adducing him, and both the adducer and witness offering to depone, That there was neither design nor concert between them; the Lords allowed him to be received. Fount. 13. July, 1703. Cochran. —

It being objected against a witness, That he was a domestic to the adducer at the time of the citation, at least was turned away a little before on purpose to habilitate him; and the answer being, That he was out of the adducer's service five months before the citation, and before there was any view of this probation; the Lords judged the objection relevant, and likewise the answer to take it off. But these objections not admitting terms for proving them, except

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except by the witness's own oath, therefore, they ordained him to be first interrogated and purged touching the time of his going out of the service, and the occasion thereof, and whether it was in prospect of his being a witness. Fount. 5. Feb. 1709. Cardosa. *Nota*, Forbes, who dates this decision, 4. Feb. narrates the case as if the servant had been turned off after citation.——Altho' a servant cannot be witness for his master, yet the master may be witness in any cause for his servant, altho' he be yet in his service. Balf. (*Winds*) 5. May, 1548. Pitbladdo.

THIS objection against witnesses repelled, *viz.* That they served the *ado*, *Servant* adducer on days wages as masons, *hired by the day*. Fount. 26. Feb. 1685. Erskine.

IN a complaint by an advocate against his servant, That he had stolen from him papers which belonged to a process, and given *3tio*, *Servants* them up to the contrary party and his *to relations*, doers, also against the said contrary party and his doers for debauching his servant; the Lords having allowed both parties to adduce what probation they could for clearing the matter of fact alledged *hinc inde*, and the advocate offering to adduce his father's and brother's servants, (his father being a party in the principal cause) to prove that they heard the boy say, his master had been unkind to him, and threatening that he should be even with him if he could; the Lords found these witnesses not receivable. Fount. 16. Jan. 1712. Kilmahew.

AN officer of a regality court, tho' he had neither fee nor pension from the Lord, was refused to be admitted a witness for *4to*, *Officer of* him. Gof. 19. Jan. 1670. Balme- *court for the* rino.——In a question, if the officer *baron*, of a regality could be received a witness for the bailie, the Lords found he might, if he depended upon the Lord of the regality for his being turned out, and not on the bailie. Fount. 29. Nov. 1678. Bailie of Falkirk supplicant.

A TENANT without tack was repelled as a witness, altho' he dwelt only on the adducer's mother's conjunct-fee-lands, to which the said adducer was to succeed after her decease. Mait. Balf. (*Witness*) 31. June, 1563. Lochleven.—The Lords re-

jected a witness as being the adducer's tenant, unless it was alledged that he had a liferent-tack; and this altho' he had a tack for 17 years thereafter, and so not removeable till the time elapsed. Nicolson, (*Witness*) Dur. 29. July, 1625. Scot.—A tenant bruiking *per tacitam relocationem*, tho' he be an heritor of other lands, yet cannot be a witness for his master. Gof. 19. Jan. 1670. Balmerino.—One possessing an acre of grass without a tack, was admitted as a witness for his master, being a merchant of a considerable stock. Harc. (*Probation*) Feb. 1682. Crumstein.—A witness, being tenant to the party, when he compeared, was declined, tho' he was not his tenant when first cited. Dur. 15. March, 1632. —A witness was rejected, because he was a moveable tenant, wanting a tack at the citation, tho' he got one afterwards, because it might be given him on purpose to capacitate him. Fount. 16. July, 1680. Rome.—A moveable tenant admitted to prove his master's possession, in order to infer prescription. Harc. (*Probation*) 8. Nov. 1687. Fotheringham.—A moveable tenant led by his master was received as a witness. In this case it was a proof of an old fact, where there behoved to be *penuria testium*; but, generally speaking, in the present practice of the court, this objection goes for very little. 15. Jan. 1735. Blackadder.

AS removeable tenants within burghs royal may be witnesses for their landlords, so it was found, That in this case Leith was to be respected as a royal burgh. Dur. Hadd. 11. June, 1623. Watton.

SONS or subtenants to moveable tenants may be witnesses for the master of these tenants. Dur. 11. Dec. 1632. Haddington.—It being alledged against a witness, that he could not be received, as being subtenant to a moveable tenant with-

6to, *In pradio urbano.*

7mo, *Subtenants to a moveable tenant.*

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ut tack, and so under the same influence, terror and
we, since, if the tenant be removed, all his cottars
must go out with him; yet the Lords repelled the ob-
jection, and sustained the witness. Fount. 5. Feb.
1709. Cardross. Bruce, 30. Nov. 1716. Mon-
rief.

THE Lords admitted an artificer's servants, *cum*
nota, as witnesses for their master to
prove the sufficiency of a piece of work. 8vo, Servants.
old by him, and wrought by them, be- admitted, ubi
ing necessary witnesses. Forb. 11. July, est penuria.
1705. Inverury. — The Lords sustain-

ed menial servants to prove the terms of a bargain of
alt to the master's behoof, being also necessary witnes-
es. Forb. 31. Dec. 1708. Smith.

THO' a person reside within a baron's bailiary, yet
he Lords found that he may be adduced
by him as a witness. Sinc. 15. March, 1710, Other
1740. Somervel. — A person may be grounds cre-
witness for another, to whom he had ating fear and
bound lawburrows preceding his citation awe.

to be witness. Balf. (Witness) 20. March, 1711.
1744. Adamson. — Divers persons being sued, and
he pursuer passing from some of them, and insisting a-
gainst the rest, the Lords found, That the persons
passed from could not be witnesses for him in that
cause. Balf. (Witness) 3. March, 1766. Drylaw.

— In like manner, it was found, That if a person's
name be inserted in the principal summons, as a party,
and yet he be not summoned, he cannot be a witness
in that cause. Balf. (Witness) 7. March, 1775. King's
Advocate. — A person called as a party in a process,
being passed from *simpliciter* by the pursuer, was al-
lowed to be examined as a witness *cum nota*. Forb.

1. July, 1712. Hay. — It being objected against a
witness, That the adducer had got bond for a sum of
money from the witness, whom he had under dili-
gence for it, which impression might bias him to be
partial; the Lords repelled this objection. Fount.

1. Feb. 1711. Campbell. — In a process for a ver-
bal injury committed against a magistrate, sued after he
was out of office, the common town officers were re-
ceived witnesses for him. Forb. 18. Nov. 1712. Tod.

— In a process about a piece of controverted ground, between a burgh and a neighbouring heritor, it being objected against the town's witnesses, That the magistrates were in use to pay the half of the stem or houses and trade, which, if they pleased, they might wholly exact from the witnesses, so that they were under the magistrates influence; the Lords repelled the objection. Bruce's MS. 30. Nov. 1716. Moncrieff.

— In a similar case found, That the town-clerk's deputy was no more receivable to bear witness for the town than a moveable tenant for his master. Fount. 17. Jan. 1679. Hatton.

IN a process at the instance of an executor-creditor, against a debtor of the deceased's, *Interest in the cause. And, Imo, Where it is direct.* was pledged for the defender. That by the deceased's order, he had made payment of the sum to taylor, baker, &c. to whom the deceased was owing; this order was not found probable by

their oaths to whom the payments were made; seeing they had an interest in the cause. Dur. 5. Feb. 1642. Murray.

— The Lords admitted *casuaria*, an instrumentary witness to depone for disproving a party's subscription, tho' he was to have been a gainer by annulling the writ. Forb. 23. Nov. 1708. Sim.

In a declarator of recognition, there being a joint probation, the defender, the heritor, adduced a witness, against whom it was objected, That he was creditor to the defender who had nothing to pay his debt, if the lands fell under recognition, and consequently the witness would lose or win. The Lords repelled the objection against the witness, his interest being but consequential. Harc. (Probation) Jan. 1682. Hay.

— It being objected against witnesses adduced in a process for proving the passive titles against the defender, That they were creditors to his father, and so might lose or win by the probation, in so far as the proving of the passive titles would make the defender represent his father, which would secure the debts due to the witnesses. Answered, The witnesses are secured by wadsets from the defender's father, and they are the defender's own people, viz. his bailie, his griever, and his clerk, who will not readily depone against

against the master any thing that is not true; besides, intromission with heirship is of difficult probation. The Lords repelled the objection. *Harc. Probation* 11 Feb. 1682. Flockheart. — In a process of sale, some of the creditors being adduced as witnesses to prove the rental, the Lords refused to admit them, tho' they were necessary, there being *penuria testium*; and tho' they were not adduced to prove the value, in which they might be more suspected, but only the rental. *Fount. 23 Dec. 1692.* Brisbane. — A bill of exchange being suspended; and improbation proposed against it; the Lords found the cautioner in the suspension was not a habile witness for the suspender, as being interested in the cause, tho' the suspender was *non exceptio major*. Upon this, the suspender offering to consign the money, it was answered, That this would be a good deed, or gratification to the witness. Replied, Tho' a paction to this effect, privately entered into, might look suspicious; there can lie no objection, where the cautioner is relieved *palam & auctoritate proutone*. The Lords found the witness might be simply received, as to the producing of writs, that *comparatione literarum* might serve in the improbation; but as to his giving his judgment and opinion upon the hand writ and subscription, that he ought only to be admitted *cum nota*. *Fount. 17 Dec. 1701.* Alison.

IN a reduction of a disposition, as done on death-bed, to the prejudice of the heir, one of the witnesses adduced by the defender, to 2do, *Interest* prove that the deceased came to kirk *of friends*, and market, being objected to, for this reason, that his mother had a legacy or debt left her by the deceased, and so he was concerned to depone for supporting the disposition; because, tho' the legacy was payable out of the moveables, yet they being *aliunde* exhausted, she must get payment out of the lands. The Lords first declared, That they would only admit him *cum nota*. But thereafter they *simpliciter* rejected him. *Fount. 8 Dec. 1686.* Smiths.

NOT only kinsmen to the magistrate of a burgh royal, but even indwellers in the town, were repelled as witnesses in an action *quæstio, Inhabitants in questions of common good.* sued by the magistrates. The like, in the case of the burgesses of a neighbouring burgh, who often pastured their cattle upon the said burgh's common-ty.

Sinc. 13. Feb. 1541. Town of Sellirk. — the contrary was found thereafter, and the indwellers in a town admitted witnesses in the town's cause; because it was presumed that they had no immediate and particular interest nor profit by the cause. Co.

31. Jan. 1576. Hospital of Leith. — The like, tho' the question was about the town's common good; Bal.

(Witness). Town of Leith. — The town of Inverness having adduced witnesses to prove the quantity of the miltures of their mill, it was found, That those who were present bailies or town officers, could not be witnesses in this cause, which concerned the common good; but that others, altho' members of the incorporation, might be witnesses, tho' they had been formerly magistrates or officers; and a witness was also admitted, who was a present member of the council, *cum nota.* Stair, 13. June, 1672. Town of Inverness. — Burgesses, *in re communitatis*, are habile witnesses, and cannot be repelled. Fount. 14. June, 1709. M'Kenzie. — In a process about a piece of controverted ground, between a burgh and a neighbouring heritory, it being objected against the town's witnesses, That they were burgesses of the burgh, and might lose or gain by the cause, they being entitled for a small gratuity to pasture on the controverted ground, and to bleach there *gratis*, the Lords repelled the objection. Bruce's MS. 30. Nov. 1716.

Moncrief.

It was found, That the inhabitants of a burgh could not be witnesses for the town *quo, Inhabitants in materia privilegii*, whether they had an exclusive criminal jurisdiction, *about the town's jurisdiction.* because that was *in re communi, quæ tangit singulos*, seeing each burgher may be criminally sued, whereas their common good relates to them only as a body corporate.

porate; but found honorary burgesses receivable.
Fount. 17. Jan. 1679. Hatton.

IN the proof of a tenor, a witness being led, who had a wadset which depended on the existence of that deed, and so might lose or win by the cause; and it being answered, That the wadset-sum was otherwise well secured by cautioners; the Lords did find, That unless he would renounce his right of wadset, and take him to his security by cautioners, he could not be received a witness. Gos. 8. Feb. 1677. Stewart. — Two witnesses being adduced for proving the condition a party was in, when he signed a paper on death-bed; and it being objected against one of them, that he was a remote substitute in a tailzie, which this death-bed-deed had broken and altered, and so might gain or lose by the cause; the Lords refused to receive him as a witness, altho' he offered to repounce under his hand all pretensions to the succession, which offer made rather a stronger objection, as inferring a shrewd presumption either of partiality or of collusion. Forb. 14. Fount. 17. June, 1707. Livingston.

IT being offered to be proved against a witness, that on a letter or message sent him by the other party, he came to Edinburgh to receive a citation, tho' he did not appear before a judge to make oath, or to depone; till he was lawfully cited to bear witness in the cause; the witness was rejected. Fount. 27. June, 1701. Hope. — The Lords rejected witnesses as ultroneous, because they received only verbal citations, but no written copies. Fount. 14. June, 1709. McKensie.

IT was found not to be partial counsel in a witness, to declare to one of the parties the verity of what he knew in the cause, unless he did it unrequired, and informed and persuaded the party to intent the action. Hadd. 22. Jan. 1683. Dalgleish. — It being objected against a witness, That he had told what he was to depone, which was a *proditio in seipsum*; it was found, That witnesses may

may be asked what they know of the matter, provided no paction be made with them to abide at that information. Gof. 9. Nov. 1669. Towie. Count. 19. Feb. 1679.

—It was sustained as an objection against a witness, That in return to a letter of the pursuer's, he had acknowledged by a letter the fact libelled, which was in some sort *prodere testimonium*; but he was ordained to be examined *cum nota*. Stair. 16. June. 1681. Elies. — It being objected against a witness, That he had given partial counsel, at least had concerned himself as a party for the adducer, having been at consultations with him in relation to the process; it was found, That he could not be a witness, tho' he was a person of integrity above exception, and that he was free to declare, that, at the said consultations, the point whereupon he was to be used as a witness, was not under consideration. Dirk. 24. Jan. 1677. Drummelzier. — It being objected against a witness, that he not only was frequently entertained in the adducer's house, but was present at consultations in the cause, tho' that was before, and not after the Lords by an act had fixed the points to be proved; yet their Lordships thought this an affected abstinence, and therefore rejected him from being a witness. Count. 51. July. 1699. Home.

A MAN under caution to underly the law for theft, not convicted, may be a witness. Hadd. 5. June. 1622. Jedburgh. — It being objected against a witness, That he was infamous, *infamia facti*, as having confessed adultery before the Kirk-session, and satisfied for the same; the Lords considered, That what was done in *foro penitentiali* for exonerating of one's conscience and purging the scandal, was no ground to deprive him of his civil privileges as a witness or otherwise, else that would fear men to confess and harden them in their sins; and therefore repelled the objection, unless he had been convicted in a civil court. Count. 22. Feb. 1709. Taylor. — It being objected against a witness, That he had held out a garrison against the government, for which he had been put under sentence of death, and tho' the punishment was remitted by a pardon, the infamy still remained, so that he could not be a habile witness.

witness; yet the Lords, considering the articles of capitulation for surrendering that fortress, and thereby finding, that the pardon was not absolutely gratuitous, but for an onerous cause, and so fully remitting the crime, they found him a habile witness. *Forbes*. 7. *Forbes*. 12. July, 1700. *Forbes*. In clandestine crimes, such as adultery, infamy is not a relevant objection against a witness, unless it be *infamia juris*, by doing a deed which the law declares to infer infamy, or where the witness is declared infamous *sententia iudicis*. *Stair*. 31. Jan. 1671. *Milton*.

It being objected against a witness, who was school-master of the place, That, after he was cited, he had said in a company, *Witness saying*, There were swearers of his swearing. *That he would* to him, and he would swear best to *swear best to them* that paid him best, the Lords *that paid him* sustained the objection as relevant to *best*. *reject him*. *Fount*. 17. June, 1707. *Livingston*.

THE Lords admitted witnesses, altho' the adducer had kept them fifteen days in his house before they came up, and then paid *Giving more* them before-hand their due charges. *to a witness* *Colv*. Aug. 1387. *Chalmers*. The attempt of corrupting a witness, by giving, or promising a good deed, *than for necessary char-* more than suitable to the witness for his *ges* charge, is a relevant objection. *Stair*, 31. Jan. 1671. *Milton*. Objection being made against witnesses, That they had received good deeds from the adducer, is so far as he hired a boat for them in the north, to bring them about to Leith, and put in a considerable quantity of provisions to serve them by the way, and being, by storm, put in at a port, had assisted them, and caused his stabler at Edinburgh give them lodging; the Lords thought there was no evidence of corruption here; yet judging it a bad precedent to engage the affections of poor people in time of dearth, they remitted to the ordinary to enquire into the kind and quantity of the provisions, and if they were not beyond the legal allowance, to receive the witnesses. *Fount*. 13. June, 1699. *Forbes*. Two of the de-
sender's

fender's tenants being adduced for the pursuer, and in the preliminary of their depositions acknowledging That an unknown person met them in the way, and gave each of them half a dollar, saying, He wished well to the pursuer, and hoped they would do the like; the Lords suspected that this might be an artifice of the defender to disabilitate the witnesses, there being a *penuria testium*, and appointed an enquiry, but no discovery being made, they received the witnesses *ex nota*, because of their taking money, and sent them both to prison. Fount. 24 June, 1701. Erskine.

IT is a relevant objection against a witness, That he was instructed or prompted how to depone, without necessity to alledge *prompted how* that the witness undertook to depone accordingly; this being introduced in *edum corruptentis*, inferring no blemish

upon the witness so prompted, who consented not, nor swore falsely. Stair, 31. Jan. 1671. Milton. The like, where the adducer had called the witness to his chamber, and shewed him an unsubscribed rental of the lands whereof the rent was to be proved. Harc. (Probation) Feb. 1682. Crumlane.

A WITNESS was rejected, because he had begged a few days before, altho' it was alledged that he had free gear worth the King's unlaw. Nicolson, (Witness) June, 1622. Jedburgh. A person was received as a witness, altho' he had taken the benefit of *cessu honorum*. Nicolson, (Witness) 19. Jan. 1628. Dundas. Found. That a witness being under a fee or having a trade, may be sustained, altho' he have no effects. Forb. 24. Nov. 1200. In clandestine crimes, such as adultery, it is not a relevant objection against a witness, that he is not worth the King's unlaw. Stair. 31. Jan. 1673. Milton.

IN a spulzie, it being alledged, That the pursuer had called all that were present upon the ground as accessories, to deprive the defender of proving his defence by witnesses; the Lords ordained the pursuer to declare whether he would insist against the others as accessories;

fories;

ories; and if he did insist, ordained the process against the principal party to sist till the accessories were discussed; that such of them as were absolved might be used as witnesses. Stair, 24. Feb. 1662. Irvine.

SOCIUS criminis not found a relevant objection in *materia falsi*, because, if this was a relevant objection, the direct manner of improbation could never be followed out. Gos. 9. Nov. 1669. Towie.—Whether a *socius criminis* can be admitted as a witness to prove forgery against another, debated, but not determined. Fount. 17. Dec. 1696. Stewart.

IN piracies and oppressions at sea, the Lords found, That the sufferers of the violence may be witnesses, if they be not pursuers, *In crimes the parties injured, if not pursuers.* because it would be impossible to prove it by others. Hadd. 14. Feb. 1606. Cultmalindie. Col. Jan. 1582. Flemings.

THE testimony of women in civil causes was repelled. Mait. 5. March, 1550.

—The same was again done in the case of probation of a person's age. *Women not receivable in ordinary causes.* Mait. 6. July, 1558. Coluthie.—Women witnesses not admitted to prove the loan of a bed; Stair, 21. July, 1675. Wilkie.

—Nor even the let of a tenement within burgh, tho' commonly employed to make the bargain. Dalr. 13. Dec. 1715. Wauch.—In the reduction of a disposition, granted by a wife to her husband, *stante matrimonio*, the Lords refused to allow women, who, as creditors to the wife, had received payment of their debt, to depone thereanent for proving the onerous cause of the disposition. Forb. 18. June, 1706. Birrel.—In a question about marches, the Lords refused to admit a woman witness. Feb. 1730. Dunbar.

—In a reduction of a disposition upon the head of death-bed, women witnesses were not sustained to prove an alledgeance, That the granter was crazy in his judgment, there being no *penuria testium*. 13. Jan. 1736. Wiseman.

WOMEN, *omni exceptione majores*, were found habile witnesses in the crime of adultery, in respect of the occultness thereof. *Pal.* 1, Home, Fount. 1. and 2. Jan. 1684.

Monteith.—The Lords found it relevant to reduce a discharge subscribed by a woman, that it was offered to be proved to have been presented to her in her child-birth pains, which their Lordships judged an unreasonable time, and that she was *tho quasi in lecto, & vis satis mentis campes*, and allowed it to be proved by women witnesses, others not being allowed to be present in *puerperia*. Fount. 7. Dec. 1686.

—In a process of aliment, at the instance of a wife against her husband, he having separated & alleged maltreatment, women were found habile witnesses in such cases. Fount. 13. June, 1691. *Gordon.*—It being alleged in a process, That a man had *deceit* concealed that his wife had a cancer in her breast at the time he sold her jointure, whereof she died within nine or ten months, and the Lords having allowed a probation of the fact before answer, and one of the witnesses adduced being a woman, their Lordships admitted her simply without exception. Fount. 23. Nov. 1698. *Fletcher.*—In mutual processes for the right of some lands, between a creditor and the apparent heir of the debtor, the latter alleged, That the former had violently thrust him and his wife out of the house, and then intromitted with the charter-chest, and so might abstract and destroy discharge that might have extinguished his claims; and this being admitted before answer, and he adducing diverse women witnesses, the Lords, in regard it was in a *domestica*, and under night, and to prove acts of violence; allowed the women witnesses to be received. Fount. 17. Dec. 1709. *Neillson.*—Women witnesses admitted to prove furnishing out of a shop kept by a woman, and in which there were no male apprentices. *Dalr.* 13. Dec. 1715. *Mairhead.*—The Lords, *ex antiqua & ubi erat penuria testium*, allowed women witnesses to be received to prove a propinquity in order to a service. July, 1728. *Marjoribanks.*

IN a process of adherence, the commissaries having refused to allow women witnesses for proving the actual celebration of the marriage; but declared they would admit them to prove cohabitation, and their being reputed man and wife, and the man's owning and acknowledging her to be such, and the child to be his lawful begotten child, and any other matrimonial deeds subsequent to the marriage; the Lords, on advising a bill of advocacy, found, That the commissaries had not committed iniquity, and therefore remitted the cause. Fount. 5. Jan. 1705. Chalmers.—The Lords found women not habile witnesses to prove that persons were married, or held and reputed so. Forb. 9. Feb. 1709. Forbes.—A woman having raised a declarator of her marriage with a certain person then deceased, in order to have the benefit of the legal provisions; the Lords refused to sustain the naked testimony of two women as witnesses offered for the pursuer to prove the solemnization of the marriage, unless further adminicles could be descended on. June, 1730. Murray.

A WITNESS was repelled, because a near friend of the defender had slain the said witness's nephew upon presumed deadly Inimicitia capitalis. feud, altho' the witness in the preliminaries of his oath had deposed that he

knew him none, because he was not accessory to the slaughter. Col. May, 1589. Atthifon.—The

Lords repelled a witness, because there was deadly feud between the said witness and a cousin-german of the party against whom he was adduced, altho' it was not alledged that the said party was art and part in the feud. Hope, (Witness) 12. Nov. 1616. Muirhead.—

A witness was repelled, because the party against whom he was adduced had wounded the witness's brother, and left him for dead in his presence, altho' the witness offered to purge, &c. Hadd. Nicolson, (Witness) June, 1623. Jedburgh.—

It was found, That persons may be witnesses in a cause against a party, altho' they had charged her upon a lawburrows, and had given their oaths that they intended her bodily harm, unless the lawburrows had

proceeded upon blood and deadly feud. Hope, (*Witness*)

June, 1610. Hakon.—The Lords received one of two persons under mutual lawburrows as a witness against the other, the former purging himself by oath of any malice towards the latter. For 16. Nov. 1711. Armstrong.

IN a declarator of affriction, the pursuer being allowed to prove the quantity of the culture, and citing the defender's wife as witness, because she was *proposita*, and knew the quantity best, the Lords inclined to think that she could not be adduced a witness, her husband reclaimed. Found

23. July, 1700. Erskine.—A young lady suing her step-father for an aliment, upon account of his severity in beating her, &c. and she having cited his son to witness against his father, being *in crimine priuato & domesticis*, which could not be otherwise proved, yet the Lords declined to receive him, because parents and children, and such near relations are not so much rejected a *testimonio*, as excused from bearing witness *ob reuerentiam personarum, & metum perjurii*. Found

23. July, 1700. Drummond.

IT being objected against a Jew, who was adduced as witness in a cause, That Jews bear a rooted hatred against all Christians, the Lords thought, That if a Jew was led a witness in a cause between a Christian and a Jew, there might be reason in that case to suspect him, but

it being between two Christians, his disowning JESUS CHRIST for the Messias did no more incapacitate him than it would do a Socinian, our *formula iurandi* mentioning only God in the general; and that a Jew will not swear on the New Testament, yet he will swear by JEHOVAH on the law of Moses. Nay, which is more, a Turk or a Pagan is capable, for in Captain Green's case of piracy, two heathen boys were admitted; and if in criminals, why not in civil cases? It was also remembered that the Queen had knighted Sir Solomon de Medina, a Jew, and if capable of honours, why not of bearing testimony? And

(W) e allow Quakers to declare in their own way. The
ords therefore admitted him *sine nota*. Forb. 17.
ount. 19. Jan. 1712. Menzies.

IN proving a person's age, the Lords, *ex officio*,
ceived witnesses who were *affines & Inhabile wit-*
consanguinei. Col. June, 1581. *nesses admit-*
allace.—Witnesses, against whom *ted ex officio*.

gal objections lie, are yet sometimes
amined *ex officio*, *ad informandum animum judicis*;
t in such a case the Lords declared, That in advising
e proof, they would have consideration of the objec-
ons. Dur. 21. Dec. 1630. Johnston.—A bond

anted by a minor, bearing borrowed money, being
igned without warrandice; in a reduction of the
me upon minority and lesion, the assignee offered to
ove the onerous cause by witnesses, *viz.* his cedent,
e original creditor, and his servant; the Lords, be-
re answer, examined these witnesses *ex officio*.

ur. 28. July, 1637. Dunnipace.—In a reduc-
on of a testament, the testamentary witnesses be-
g appointed to be examined, and it being objected
against one of them, That he was a legatory, and so
uld not be admitted; the Lords decided that he
uld not be adduced, but declared, That, if they saw
ecessity *ad informandum judicis animum*, they would
amine him. Fount. 17. Nov. 1699. Wilson.

DEPOSITIONS being taken in the country by
ommission, the Lords sustained the
me, tho' they did not bear, that the *Form of depo-*
itnesses were examined by these for- *sitions.*

al words, "As they shall answer to
od," the challenge being laid at a great distance of
me, and the mean of probation being now probably
erished. Fount. 9. Dec. 1684. Falconer.—The

ords refused to sustain depositions of witnesses as pro-
ative, because the said depositions bore only in the
arrative, that the witnesses were deeply sworn, but
ot that what they deposed "was truth as they
ould answer to God." Fount. 9. Dec. 1685.

raigie.

A WITNESS, after he had been examined, giving in a bill to the Lords, pretending that some things had escaped him, which now burdened his conscience, and therefore, craving to be re-examined; the Lords refused the desire of the bill, in regard that, by his oath, there was a *jus quæsitum* to the party, which the witness could not retract, and such re-examinations must only be at the desire of the adducer and not of the witness himself. Fount. 16. July, 1701. Irvine suppliant. — The Lords refused to re-examine a witness on special interrogatories, he having already deponed *negative* to the general. Fount. 16. Jan. 1712. Kilmaronock.

THE Lords refused to allow expences to a witness compearing to depone, after extracting of a second diligence against him, but they allowed the expences of his journey before, and granted caption against the adducer's agent, till payment thereof was made. Forb. 19. June, 1707. Feuers of Frasersburgh. — A witness deponing, that he used to ride, when he travelled, and that he came on horseback to depone in the cause, was allowed the expences of his horse. Forb. 11. June, 1713. Chalmers.

THO' regularly, a witness ought to be brought into court by the party who is to make use of his testimony, yet there are certain connections which make this incumbent on the opposite party. Rem. Dec. p. 73. July, 1743. Executors of the Earl of Londonderry.

BURGESSES are good witnesses for the town, in questions concerning the town's property. *Ibid.*

THE advocate and agent for a defender were rejected, tho' adduced by him as witnesses to prove a communion, where no others were said to be present. Home, p. 388. 6. July, 1743. Adams.

THE objection, that one witness was lawyer, and another agent for the adducer, is good, tho' the knowledge of the facts they were to be examined upon preceded the period of their being employed. Home, p. 392. 12. July, 1743. Lindfays.

WITNESS.

65

AN agent's clerk was admitted as a witness, he being the writer of the deed under reduction. *Ibid.*

A WIFE is an inhabile witness against her husband in a civil cause. Home, p. 497. 5. Jan. 1744. Campbell.

A WITNESS may be examined on interrogatories, tho' his answers may involve himself in a malversation in his office. Home, p. 414. 21. Feb. 1744. Murray.

JAMES REID, having sold some tenements belonging to him in Glasgow, his creditors arrested the price in the hands of the purchaser, and, in order to avoid expence, the creditors agreed to pass from their arrestments, and to divide the price equally amongst them, in proportion to each of their claims. The proportion of the price which fell to be drawn by William Mackilloh, one of the creditors, did not near pay his claim; whereupon he did diligence against Reid for the balance; who suspended on this ground, That it was a branch of the concert, that the whole creditors should make themselves to the above price, in place of full payment, and should accordingly give him a full discharge of their whole claims. Mackilloh having denied the fact, a proof was allowed. It was objected for the charger, That the proof by witnesses was not competent in this case: 1st, Because, tho' a concert amongst creditors to accept of a proportion of the price, towards payment of their claims, would be competent, yet a concert to accept of the debtor's effects in full payment of such debts, was not competent, the same being gratuitous, which could not be proved by witnesses, and taking it as set forth in the suspension, that each of the creditors agreed to sign a formal discharge, there could be no doubt, but that there was *locus penitentiae* before writ intervened. 2^{dly}, The charger objected against two of the three witnesses adduced, That, tho' their being creditors did not disable them from being witnesses, yet, as they had subscribed a deed obliging themselves to be at the expence of defending this process, which made them parties in the cause, they were disabled from being witnesses. To this it was answered for the suspender, That concert could not be divided, but behoved to be taken as it stood; and that

a concert amongst creditors, to accept of a proportion of their debt in full satisfaction, was noways similar to a gratuitous promise. That when a debtor surrendered all his effects to his creditors, it was a transaction to avoid the exhausting the subject by expence of diligence which was most favorable, and rather to be presumed than that the creditors keep up the remainder of their debts to harass the debtor, and deprive him of bread. And, with respect to the objection to two of the witnesses, it was answered, That the creditors had been allowed to be witnesses by the Lord Ordinary's interlocutor, awarding the proof; that they were necessary from the nature of the thing, as no other persons were possibly present but the creditors and debtor: That if then the creditors were liable, it could be no objection that they were to be at the expence of defending the process; That it was their common interests to support the concert, and no person could be supposed to lay out expences in doing it but themselves, especially as the debtor had nothing of his own: That tho' the creditors were indeed in effect parties, yet they were good witnesses in this case, being necessary, as no other person was presumed to have been present; and it was a chance that there was another present, who as he concurred with the two creditors who had been adduced, so he confirmed their testimony beyond the power of suspicion. The Lords found no sufficient evidence of the alleged agreement; and therefore, found the letters orderly proceeded. Home, p. 415. 24. Feb. 1744. Mackilhose.

GORDON younger of Balledgarno sued a proving the tenor of a disposition, in virtue whereof he claimed the said estate, to which, otherwise, his father would have succeeded, and offered to adduce as a witness his sister, to prove a conversation between her father and her, owning him to have had the paper in his possession. It was objected, That she could not be examined, she being sister to the adducer. To which it was answered, That her relation was nearer to the defender, she being his daughter. The Lords were dubious, but observing that there were several old decisions in favor of the objection, and that there did not appear any since, in which the contrary determination

had been given, they sustained it. *Falc. v. I. p. 251.*
16. June, 1747. Gordon.

CHILDREN were admitted as necessary witnesses in a process of separation between their parents. *Falc. v. I. p. 334.* 5. March, 1748. Cumming.

A WITNESS to a deed being employed as agent in a cause, wherein the deed was quarrelled, was allowed to prove the subscription as a necessary witness, but not the delivery. *Falc. v. II. p. 143.* 21. Nov. 1749. Earl of March.

LADY Phesdo, having named her son John Falconer of Phesdo, her executor and universal legator, gave by several bonds executed between the 6. of May, and 3. of June, 1748, considerable sums to her daughter, grand children, and great grand children, and particularly to Patrick Falconer, son to Monkton her grandchild, and to Elizabeth Douglas, daughter to John Douglas of Tilliquholly her great grandchild, which bonds were witnessed by two servants, and either by Thomas Arbuthnot of Fordon, her grandchild, or by the said John Douglas, who had married one; and she died in about a month. Phesdo pursued a rescution of these bonds; and examined the two servants, who deponed, That the lady's hand was held and supported in signing; and that the bonds were not read in their presence: and there he inclined to rest his proof, when Patrick Falconer and Elizabeth Douglas applied, by petition, for a diligence to cite Margaret Falconer the lady's daughter, the said Thomas Arbuthnot and John Douglas, and Margaret, Jean, and Anne Arbuthnots her grand children, to prove the state of her judgment, and manner of executing the bonds: To which it was objected, That all these persons were related to Elizabeth Douglas, in the degrees defendant of bearing testimony in her favor: And, though they did not all stand in the same relation to Patrick Falconer, yet, as they had either got bonds themselves, or stood in that degree of relation to those that had, and these bonds were granted so near in time to each other, as that they ought to be considered as one settlement, the witnesses ought not to be received; especially, considering they were not cited at first, but were now sought to be brought after the pursuer had led his proof. Answered, The whole witnesses

nesses are nearer related to the pursuer than any of the defenders, and are proper witnesses to give account of the condition of their parent, when she was dying: The instrumentary witnesses are necessary, and will prove the reading of the papers before the servants were called in: And though the others cannot support their own bonds by their testimony, yet as the causes are different, they ought to be examined touching the other bonds, especially such as are granted to those unto whom they do not stand in the defendant degree of relation. The Lords found that the two instrumentary witnesses, Thomas Arbuthnot, and John Douglas, might be examined, as to these bonds only to which they were instrumentary witnesses, and only as to what passed at signing the said bonds, and as to the circumstances of the Lady Phesdo's health at the time of signing: And found, with respect to Elizabeth Douglas, that none but the instrumentary witnesses could be examined as to the bond in her favor: And, with respect to Patrick Falconer, found, that such of the witnesses mentioned, as had not got bonds might be examined as to the bond in his favor, but that such of them as had got bonds, and were not instrumentary witnesses, could not be examined at all. *Falc. v. II. p. 166. 23. June, 1750. Falconer.*

A WITNESS, having expressed resentment, and being purged, and no cause of ill-will appearing, reprobaters were not sustained. *Falc. v. II. p. 284. 26. Nov. 1751. Irvine.*

A WITNESS, liable to be set aside, on account of the proximity of blood to one of the parties, cannot be received, altho' he is of the same relation to the other party. *Fac. Col. v. I. p. 70. 19. Dec. 1752. Park.*

TUTORS are admitted as witnesses for their pupils, where the fact to be proved is, whether the pupil's father had, or had not received money from his brother, which he lent out with his own, on bonds in his name, with a substitution to his brother. *Fac. Col. v. I. p. 213. 28. Feb. 1755. Yule.*

A COMMON brother is rejected as a witness. *Fac. Col. v. II. p. 55. 27. June, 1757. Bengo.*

SERVANTS

SERVANTS are admitted as witnesses in behalf of their masters *ubi est penuria*. Fac. Col. v. II. p. 118. 16. Dec. 1757. Fairly.

THE objection to a witness, That he might gain or lose by the cause, was sustained. Fac. Col. v. 2. p. 340. 5. July, 1759. Mulcher.

A COMMISSIONER, for taking a proof, was allowed to swear an interpreter in examining a witness, who from indistinctness of articulation, could be understood only by those who daily conversed with him. Fac. Col. v. III. p. 305. 25. Jan. 1764. Pollock suppliant.

DEPOSITIONS, how to be subscribed? See *Writ*.

INSTRUMENTARY witnesses. See *Writ*.

WRECK.

A DECREE being obtained before the admiral, against a person, as holden *pro confesso* upon his intromission with some wreck-goods, which decree, among other things, decerned him to pay the price of an ox, which escaped, and was intromitted with by him; the Lords, in a suspension, reduced the decree, and suspended the letters *simpliciter*, because the sentence itself confessed that there was one living creature which escaped, so that the ship could not be esteemed a wreck. Dur. Hadd. 12. Dec. 1622. Hamiton.—The statute is our rule, bearing, That, stranger ships broken upon our coast, should have restitution of their goods, where they observe the like upon their coast. Stair, 20. Jan. 1674. Jacobson.

A SHIP being wreck, and the admiral disposing to one who seizes upon the vessel, and brings ashore some of the loading, and secures the rest of the bulk with the ship itself; the Lords found him secure by possession, as if it were of all, and the next succeeding was

was found to have no right. *Gof. Stair, 27. July 1677. Albany.*

WHERE a ship is damaged by being run on shore, in order to save the cargo and lives of the men, the owners of the cargo must pay their proportion of the loss. *Fac. Col. v. III. p. 289. 30. Nov. 1763. Landale.*

W R I T

Subscription of the Party.

Subscription by initials in private deeds. **A** BILL subscribed with initials, by an ignorant country woman, who could not read, nor ever had been in use to write, blank scores being drawn by another hand, which she was made to fill up with a pen, was found null: it being pleaded, That this could not be called the person's ordinary subscription, which is what makes a writ effectual, nay, that it could not be called a subscription at all, not being a writing in any proper sense. *Feb. 1735. Pringle.*—It was found relevant to sustain a bond subscribed by initials, that the granter was in use so to subscribe. *Spot. (Contrasts) Auch. (Subscription) 9. Jan. 1628. Piery.*—A disposition was sustained, tho' subscribed by initials only, before two witnesses, the disponent always proving. That this was the disponent's usual manner of subscribing, not only by witnesses, but also by other writs so subscribed. *Fount. 20. Jan. 1693. Ker.* The Lords sustained a bond signed before witnesses by initials, being done in Ireland; nor was it put upon the pursuer to prove, That the granter was in use so to subscribe. *Dur. 20. Jan. 1631. Houston.*—A single writ of the same form with that quarrelled, was sustained as an evidence that

that the party was in use to subscribe by initials.
Feb. 1723. Traquair.

SUBSCRIPTION by initials is good in law, where it is the party's ordinary form of subscribing; but in denying that it is the party's hand-writing, the objector is not put to the necessity of improbation, but may do it by way of exception, in which case the user of the writ must prove the subscription by the instrumentary witnesses. Dur. 14. Feb. 1633. Grier-son. Hadd. 17. Jan. 1611. Carnaway. — A party sued upon his bond signed by the two initials of his name, as also by a notary and three witnesses, denying the subscription to be his; it was proved by the instrumentary witnesses, That it was his custom so to subscribe, but as to the actual subscription two were affirmative and two negative, refusing that they themselves subscribed, or saw the party subscribe; the pursuer's oath, taken *ex officio*, affirmed the truth of the subscriptions. The Lords found the bond sufficiently proved, the pursuer being a man above suspicion, and no improbation proponed. Stair, 16. Nov. 1667. Culterallers. — An assignation of a bond of 2000 merks, signed only by initials, being quarrelled in a reduction by the alledged granters as false; the Lords found it necessary to be proved, not only, that the party had been in use formerly so to subscribe, but also, that he did actually subscribe the writ quarrelled, the first *prout de jure*, the other by the instrumentary witnesses only; it being of dangerous consequence to carry considerable rights by such subscriptions, which may be easily counterfeited, and can hardly be redargued *comparations literarum*; therefore, they would sustain no extrinsic witnesses, tho' it was reported there was only one of the instrumentary witnesses alive, the assignation being of an old date, and nothing having followed thereupon. Stair, 21. June, 1681. Coutts. — A bond of 500 merks subscribed by initials before witnesses, was found not to be probative *per se*, unless it were proved by the witnesses inserted, That the debtor did actually subscribe, or, they being dead, it was proved, That the debtor was in use to subscribe by initial letters. Harc. (*Subscriptions*) Nov. 1683. Galloway. — In a mutual contract, where one
of

of the parties had subscribed by initials, the Lords, in discussing a suspension at his instance, repelled the objection, and sustained the contract, unless the suspender would prove that he used to subscribe at *longum*, reserving improbation as accords. Fount. 30. Dec. 1701. Forrest. — A bill was sustained signed only by the initial letters of the acceptor's name, it being proved, That the deceased was in use to sign by initial letters, and that the subscription was like his ordinary subscription, and by the writer of the bill, that he saw him actually sign. July, 1729. — Thomson.

THIS nullity being objected to the execution of a summons, That the subscription of one of the witnesses was by initials only, the Lords annulled the execution, tho' the party offered to abide by the verity thereof: for tho' subscription by initials of parties contracters is sustained *ex necessitate*, where they cannot write otherwise, care ought to be taken, in legal executions, to adhibit such witnesses as can fully and formally subscribe. Fount. Dalr. Forb. 18. June, 1707. Meek. — In a process of removing, the defenders proponed an exception to the execution of warning, That it was not duly signed, having only the initial letters of the officer's name. The court seemed all satisfied, that this was no just objection to the execution of a baron-officer, because persons are not always to be had to undertake that low office who can sign their name at length. 27. Feb. 1739. Neworchard.

IN fortification of a bill, which had nothing but a mark at it, bearing to be Archibald Johnston his mark, it being alledged, That this Johnston, a merchant and drover, was accustomed so to subscribe; the Lords, before answer, ordained the oaths *ex officio* to be taken of the writer of the bill and of the witnesses who saw Johnston write this mark, or receive the money for which the bill was granted. Stair, 26. Feb. 1662. Brown. — A bill subscribed by a mark, before two subscribing witnesses, was sustained,

being proved to be the debtor's custom so to subscribe. Stair, 1. Feb. 1669. Brown.

A DISPOSITION being quarrelled for want of describing, the objection was repelled, in respect that the last sheet, duly subscribed, contained all that was material

to the disposition. Forb. 23. Nov. 1708. Sims.

A bond written upon two sheets, was sustained against the cautioner, tho' it was subscribed only by the principal. Stair, 14. Jan. 1674. Ogilvie.

In like manner, an assignation was sustained against both the debtors, tho' subscribed but by one of them. Forb.

June, 1711. Creditors of Paton competing.

A writ was found null because not subscribed, it being granted after the 15. act parl. 1696, establishing the custom of

describing. Bruce, 18. Dec. 1714. M'Donald.

Deeds signed by Notaries.

A BILL sustained accepted by notaries for the party. *What deeds may be executed by notaries?*

8. June, 1737. Dunwoodie.

BY act 80. parl. 1579, it is appointed, "That deeds of great importance be subscribed by the parties, if they can

subscribe, otherwise by two famous notaries, before four famous witnesses." Upon this clause, an

obligation for a sum above L. 100 Scots, subscribed for the party by two

notaries, before three witnesses only, was found null; and the Lords declared in general,

that any thing exceeding that sum, without regard to the quality of the parties, was to be reputed a matter

of great importance. Dur. Hadd. ult. Jan. 1623.

Otheringham.—An obligation for the precise sum of

100 Scots, was found to be a matter of great importance; and therefore null, being subscribed only by

the notary before four witnesses. Dur. 13. Nov. 1623. Marshall.

The contrary found, viz. That an obligation for L. 100 Scots is not a writ of great

importance, and therefore it was sustained, tho' signed

signed but by one notary, before two witnesses. Dur. 22. March, 1634. Ochiltree. — A bond of L. 80 principal, and 40 merks penalty, signed for the party by one notary only, sustained as a matter not of great importance, seeing the penalty was not to be respected. Dur. 1. Feb. 1628. Halkerton. — Bond granted by a man to his three children for L. 300 was reduced at the instance of a creditor, as being signed only by one notary, altho' it was pleaded to be the same as three several bonds for L. 100 a-piece, but the importance as to the interest of the debtor was found the same, whether granted to one or to several persons. Dirk 16. Jan. 1668. Anderson.

A SUBMISSION was found null, because only subscribed by one notary, it being about an heritable right. Hope, (4th edo, Other deeds and conveyances.) 7. Jan. 1617. — A disposition to the liferent of a house, which was constituted by infestment, was found

not to be a matter of importance, the yearly rent being only three or four pounds Scots. Dur. 27. Jan. 1630. Ross. — A tack was found null as being subscribed only by one notary. July, 1729. Wilson.

— The same as to the renunciation of a tack. Dur. 23. Feb. 1632. Jervilwood. — A backbond, at the same date and witnesses with the principal assignment, was found null, because it had only two notaries, and two witnesses, being a matter of L. 1000. Hope, (Obligation) 3. June, 1613. Abercrombie.

IN a reduction of an apprising, deduced upon a bond of 5000 merks, it was objected against the bond, That it was signed by two notaries before three witnesses only. Answered, The bond is in implementation of a contract of marriage, and consequently cannot be a deed of great importance, when nothing is contained in the bond but what the party was ab ante obliged to do. The Lords found, That if the sum of 5000 merks, contained in the bond, was stipulated in the contract of marriage, that it could not be reduced upon that nullity; but if it did exceed the provision in the contract, it was null by the act of parliament, and no better than other bonds so subscribed.

310, Deeds in satisfaction and implement.

13. Dec. 1671. Jack. — For the same reason, disposition of moveables by a tenant to his master, in security and payment of bygone rack-duties, about 4 or 50 merks was sustained, tho' signed but by one notary. Dor. 3. Dec. 1675. Sutor.

A DEED subscribed by notaries was found null, because the attestation did not bear, that it was by command of the party.

Air, 26. July, 1667. Philip. — A statement being quarrelled, because made for the deceased by the miller, and yet did not bear to have been at the desire and by the mandate of the party, the Lords found the testament null. Fount. 23. Feb. 1688.

Wilson. — A marginal note adjoined to a bond, and subscribed by both notaries, found null, because the writ did not bear, that they had a mandate from the party to sign the marginal note, and it might have been done by the notaries *in intervallo*. Fount. 6. Dec. 1695. Elliotts. It is sufficient that the first attestation bear *de mandato*, tho' the same words be not again added by the co-notaries. Hare. (Subscription). 17. Jan. 1782. Dewar.

BY act 5. part. 1681, the witnesses ought "to hear the party give warrant to the notary to subscribe for him, and in evidence thereof, touch the notary's pen;" yet no law requires that the notary's attestation do mention this solemnity: the same will be presumed until the contrary be proved. Fount. Dal. 13. Jan. 1784. Dal.

Forb. 7. July, 1710. Maver, &c. A WRIT was found null, in respect it was not signed by the two notaries *ad idem*, but upon different days, and so

not present at the time, as is required by the act 80s part. 1579. Dal. 30. Dec. 1780. Notaries must sign *ad idem* co contextu. (Contrast) Dal. 10. March, 1693. Cow.

The like. Dal. 13. Jan. 1694. In Moray. The act does also imply, that the four witnesses must be present at the subscription of each of the notaries, and therefore a deed, tho' signed *ad idem* contracts by

the notaries, was found null, in respect that one of the four witnesses adjoined to his subscription these words, *Witness to the co-notary's subscription.* Forb. 24. Dec. 1709. Anderson. — So that upon a double account a writ was found null, as signed by one notary and two witnesses at one time, and some time thereafter, by another notary and other two witnesses. Forb. 27. Dec. 1711. White.

IT was objected against a writ attested by notaries, that the notaries had not subscribed their attestations. Answered, The names of the notaries are at length in the attestations in their own hand writing, which is sufficient. The Lords repelled the objection. Dec. 1731. Cullen.

THO' the act 1579, gives authority to notaries to subscribe for a party only in case he cannot subscribe himself, yet a contract was not found null simply upon that head, that the party could write, unless he would also refuse that he gave authority to the notaries to subscribe for him; in which case the command given to the notaries behoved to be instructed. Hadd. 8. Dec. 1608. Littlejohn. Hadd. 19. Jan. 1610. Craig. Hadd. 3. March. 1610. Campbell. Hadd. 14. March. 1612. Ogilvie. Dur. 31. Jan. 1637. Veitch. — The attestation of notaries for a party as *non valens scribere pro agnate*, is not probative of itself, (the notaries having acknowledged that the party could write), but must be attested by witnesses. Falc. 3. Jan. 1689. Clark.

A MINISTER can only supply the place of a notary to a testament within his own parish. Hadd. Hope, (*Testament*) ult. Jan. 1606. Hephburn. — A contract of marriage subscribed for the wife by a minister a notary for her, being quarrelled as null upon the act 133. par. 1524, discharging ministers to be notaries, except in testaments; the objection was repelled, in respect that the prohibition is not under the pain of nullity of the deed, but only of deprivation.

Minister acting as a notary. Hadd. Hope, (*Testament*) ult. Jan. 1606. Hephburn. — A contract of marriage subscribed for the wife by a minister a notary for her, being quarrelled as null upon the act 133. par. 1524, discharging ministers to be notaries, except in testaments; the objection was repelled, in respect that the prohibition is not under the pain of nullity of the deed, but only of deprivation.

tion of the minister. Dnr. 12. July, 1631. Haf-
ngton.

THE same notary cannot
subscribe for both parties in
contract. Hadd. 27. June,
610. Craig.

*The same notary can-
not subscribe for both
parties in a contract.*

Writer of the Deed!

THE act 179. par. 1593, requires, That the
riter's name and designation be in-
serted in the body of the writ, before
serting the witnesses. This act was
und only to extend to obligations,
contracts, and such like, not to *ad us*
temi, such as a *fasine*. Dnr. 26. June, 1634. John-

*Must be nam-
ed in the deed
and designd.*

on.—By act 5. par. 1681, it is enacted, "That
all writs to be subscribed by any party hereafter,
wherein the writer and witnesses are not designed,
shall be null, and not suppleable by condescending
upon the writer, or designation of the writer and
witnesses." A precept of warning being quarrel-
d upon this clause, in that the writer tho named,
as not designed, the objection was sustained, the act
eing general, comprehending all private deeds exe-
uted by parties; and custom hath introduced no excep-
on with regard to precepts of warning, as it has with
gard to bills of exchange, receipts to tenants, and
ch like privileged writs, in which the writer need
ot be named, far less designed. Forb. 23. Jan. 1711.
ofs.—A decree arbitral found null for want of the
riter's name and designation. Forb. 3. July, 1711.
ort.

NEITHER the act 1593, nor the act 5. par. 1681,
quires that the writer be named
d designed in his own hand-writing. If he must be de-
esignd in the body
erefore, a bond was sustained, where
e writer's designation was inserted
of the deed.
ter the clause of registration, by ano-
er hand, who filled up the date, place, and wimes-

ses. Fount. 21. Feb. Forb. 9. June, 1710. White.
 —The writer of a deed, being also one of the instru-
 mentary witnesses, and not being designed in the body
 of the writ, but adding to his subscription, as witness,
 the following words, *and writer hereof*, the Lords found
 this a sufficient designation upon the act 1681; and as
 for the act 1593, requiring the writer to be designed
 in the body of the deed, they found the act in desue-
 tude. Dalr. 26. July, 1716. Dronnam.

THE Lords refused to find a bond null for want of
 the designation of the filler up of the
If the filler up of date and witnesses; and found, That
the date and wit- the act 1681, extended only to the
nesses must be writer of the body of the bond.
designed. Fount. 29. Falc. 30. Nov. Home,
 Dec. 1683. Watson. 19. June,

1722. Edmondston.

THE Lords found a printed bond due to a trading
 company null, because the essentials of
Printed bond; the bond, viz. the parties names, the
 principal sum, annualrents, penalty, &c.
 being blank, were filled up in writing; and the filler
 up neither named nor designed; but it being suggested,
 that the blanks were filled up with the debtor's own
 hand, they allowed this to be instructed, because in
 that case it would be valid as a holograph writ. Fount.
 Dalr. Forb. 25. Jan. 1710. Allardice. — But a
 printed bond, where the filler up of the blanks was de-
 signed, was sustained. Forb. 30. Nov. Fount. 1. Dec.
 1711. Creditors of Spot competing.

Instrumentary Witnesses.

A BOND of servitude, dated 1598, was not found
 null for want of witnesses, being
In our oldest and subscribed by the party, and was
form witnesses not the common practice to add wit-
not requisite. nesses in those days. Dur. 14. March,
 1630. Town of Edinburgh.

A T I C K E T

A TICKET from one brother to another, bearing, That he should bear the half of the expence of repairing a certain house," found null, as wanting witnesses, and not being holograph. *Witnesses made requisite by assenter practice.* Stair, Dec. 1671. Dickson.—A bond, tho' before the act 1681, was found null, there being but one witness. Stair, 4. Jan. 1668. Dow.

A DEED granted by a minor, with his curators consent, being challenged, for this reason, That there were no witnesses to the curators subscription; answered, *If requisite to the subscription of consenters.* Witnesses are not necessary to the subscription of consenters, but only of principal parties, who are to be bound by the deed. The Lords found the act 1681 was general, and therefore sustained the objection. 13. Feb. 1728. Dalkeith.

A BOND was sustained, tho' having but one witness, the substantials being written by the debtor, and it being proved to be his hand-writing. *What deeds formal without witnesses?* Stair, 23. Jan. 1675. Vans.

THIS exception being proponed against a decree-arbitral, That it wanted witnesses, the Lords found, That there being four judges subscribing, they might be witnesses to each other, as in charters subscribed by a convent. Hope, (*Arbitration*) 22. June, 1615. Moncur.—It being objected, That a submission, and a decree-arbitral following thereupon, wanted witnesses, the objection was repelled, because the submission was signed by the parties and four arbiters; and the blank on the back of the submission, in which the decree was filled up, was signed by the parties, and three of the arbiters, which was sufficient, being only for a sum of money, not exceeding L. 1000. Dur. 2. Dec. 1632. Hunter.—An obligation being challenged, as wanting witnesses, it was not regarded, That the same was signed by four co-obligants; for the Lords found, That they could not be witnesses to each others subscriptions. Dur. 14. Feb. 1633. Rankin.—An obligation wanting witnesses was sustained, the parties, who were many, being

being presumed to have been witnesses to one another's subscriptions. 7, Jan. 1732. Seabox of Queen's ferry.

A CREDITOR is no habile witness to the subscription of a bond granted to himself; and *Who may be* therefore, a bond was found null *instrumentary* wherein there were only two witnesses *ry witnesses?* inserted, of whom the creditor was one.

Dur. 21. Nov. 1627. Robertson. — Nor is a notary a habile witness to his own subscription. Dur. 20. Nov. 1627. Laskie.

THE executor named in the testament, being made also one of the instrumentary witnesses, the testament was only found null *quoad* the nomination of him as executor, but sustained *quoad* the legators. Hope, (*Testament*) 1. July, 1613. Nearest of kin of Innerleith.

— In a reduction of a testament by the nearest of kin, the Lords repelled the objection, That one of the instrumentary witnesses was also a legator, tho' he had plainly an interest to support the testament, and tho' the nearest of kin, impugning a testament, is not in the case of a debtor impugning his own bond, for he cannot object against the instrumentary witnesses, as they must be adhibited with his consent. Harc. (*Improbation*) March, 1685. Graham.

IT was found, That one of the judges arbiters cannot, at the same time, subscribe the decree himself as judge, and also subscribe it as notary for one of the parties, Col. April, 1583. Gormock. — The Lords sustained a decree-arbitral, tho' the notary, who subscribed the submission for the parties, was one of the arbiters, because the matter was small, and the parties were poor, and dwelt in a remote place, where notaries were not easily to be had. Spot. (*Arbitration*) Dur. 20. Jan. 1620. Howison.

THE Lords sustained this objection to annul a contract, That one of the witnesses was a few days short of fourteen years of age, when he did adhibit his subscription; and this was found, tho' the contract was fairly executed, and there lay no other objection against it. 12. Dec. 1738. Davidson.

IT being objected by one of the parties in a minute of sale, That the writ was null, because one of the

two instrumentary witnesses was infamous, *infamia juris*; in so far as there was a decree of improbation of a bond obtained against him some years before, finding him accessory to the forgery, and ordaining it to be cancelled; the Lords repelled the objection and found it no nullity, the witness being chosen by mutual consent. Fount. 1. Feb. 1710. Baillie.

THE Lords refused to repel a witness in an execution of pouding, altho' there was deadly feud between the witness and the debtor. Col. Feb. 1586. King's Advocate.

A BOND being quarrelled in a process as false, because one of the witnesses deponed, That he did not know the party to whose subscription he signed as witness, being then a boy of 14 years, and called off the street to be a witness; the Lords were convinced, That the bond and debtor's subscription were true: yet, in respect of the act 1681, they found the bond not false, but null. Fount. Nov. 1698. Campbell. — A disposition being challenged upon this head, That the witnesses did not know the party, they deponed, "That they never saw the party, before or after the time they were called to be witnesses, but that the neighbours in the close informed them, that such a person lived there, and that at subscribing, she declared herself to be the person before several by-standers." Against this it was urged, That the design of the law was to prevent one personating another, which could not be guarded against in the present case, where the witnesses, tho' they might know there was such a woman, could not distinguish her from any other. The Lords found, That the witnesses had such credible information the subscriber was the true person, that they might lawfully sign as witnesses. Here there was no doubt but that it was the deed of the party herself. Dirl 8. June, 1716. Walker.

THE Lords found a bond null, because one of the witnesses deponed, That he did not see the party subscribe the bond. Home, Nov. 1681. Stevenson. Fount. 12. Feb. 1684. Blair. — A witness, after

after 10 or 12 years, having acknowledged his subscription, but not remembering that he saw the parties subscribe, or heard them own that they had subscribed; but declaring That he knew their subscriptions, and was sure he would not have subscribed witness, except in the presence of the parties; the Lords found probative, notwithstanding the act of parl. 1681, requiring witnesses to see the parties subscribe, or acknowledge their subscriptions, which does not import that a witness, after a tract of years, can distinctly remember the thing. Forb. 23. Nov. 1700. Siml.

THE act 1579. cap. 80. requires that witnesses be admitted to the subscription of notaries for parties be specially designed; and therefore that the two notaries subscribed before four witnesses, whereof two were designed in the precise terms of the act, the other two were not designed, but their subscriptions were admitted to the writ, which was alleged to be equivalent; the Lords, notwithstanding, found the writ null. Dur. 8. July, 1623. Sheriff of Cavers. — But it is sufficient the witnesses be designed any where, tho' not in the body of the writ, which the act does not require. Haro. (*Subscription*) 17. Jan. 1682. Deuar.

A BOND being subscribed by the party himself, before two witnesses, also subscribing, the bond was sustained, tho' the witnesses were not designed, and not so much as mentioned in the body of the writ, because the aforesaid act relates only to the witnesses admitted to the subscription of notaries; when the party himself cannot write, the act 1720, cap. 19, which requires that parties subscribe before witnesses, provides not that the witnesses be designed, or so much as mentioned in the writ. Dur. 31. July, 1634. Home. — Upon this footing it is; That when the witnesses are not designed, or perhaps not mentioned at all, which of course lays the writ open to the objection of not being subscribed by the party before witnesses, the use is to allow the party to condescend upon the witnesses, which was found with respect to a writ before act 1681, tho' the witnesses were not so much as named

ed in the body of the writ. Forb. 21. July, 1711. Ogilvie. The like; Dur. 22. Jan. 1635. Bell. N. B. The contrary had been found, viz. That it was not relevant to condescend upon witnesses, where it was taken for granted, that the act 117, parl. 1540. requires the witnesses to be condescended on in the deed. Dur. 17. June, 1625. Kimaldie. Auch. (*Acquittance*) 28. June, 1631. Ferguson. — But in such a case it was found. That he must condescend upon living witnesses, or otherwise produce other adminicles to attract the verity of the subscription: for, if a condescendence upon dead witnesses was held sufficient, this would entirely take off the check, and be the same with no condescendence at all. Stair, 3. Feb. 1665. Falconer. — It being objected against a bond, granted before act 1681. That it was null as to one of the cautioners, having neither date nor witnesses to his subscription: and being offered to be proved, that this cautioner sign'd the same day, and before the same witnesses with the other debtors in the bond; the Lords, before answer, ordained the witnesses to be examined upon this fact. Stair, 24. Jan. 1668. Magistrates of

— One of the witnesses in an old writ, being not so much as inserted, far less designed in the body of the writ, and the pursuer offering to condescend on the person, the writ being long prior to the act of parliament 1681; the Lords, nevertheless, found the writ null and unsuppliable, now after a climacteric of 63 years, all the parties also being dead. Fount. Forb. 5. Dec. 1707. Bell.

IT being objected as a nullity against the execution of an inhibition, That the witnesses were not named nor designed in the body of it, but in a marginal note adjoined by the messenger himself; and that it did not say, (as in probative consensual writs is requisite) that the witnesses were also witnesses to the marginal note; the Lords repelled the objection: for the act 1469, cap. 32, requiring executions to be done before witnesses, requires not that the witnesses be named in the execution. Fount. 23. June, Forb. 5. July, 1710. Gray.

THE act 5. parl. 1681, requires the witnesses be designed in the body of the writ, &c. this clause was found not to extend to the execution of summons, but only

ly of inhibitions, interdictions, hornings, or arrestments.
8. Dec. 1736. Napier.

THE confirmation of an executor-creditor was found null upon the act 4. parl. 1686; because the execution of the edict wanted subscribing witnesses, tho' it was alleged by the defender, That the statute goes no further, than to introduce the form of subscribing witnesses to executions, in place of the former custom of stamping, and does not relate to edictal citations by the officers of the inferior courts, who used not to stamp their executions. Forb. 24. Fount. 25. Jan. 1711. Moir.

A TACK signed by the principal parties, but not by the witnesses, being left thus uncomplete in the hands of one of the two persons who were inserted as witnesses, he and the other, some days thereafter, put their names to the contract as witnesses, at the instigation of one of the parties. The Lords found the tack null; for the parties having broke up, without perfecting their contract, they were free, and could not afterwards be bound but by a new act of their own, interposing their consent to the subscription of the witnesses. June, 1730. Home.

What Designation sufficient.

THE writer of a bond found sufficiently designed by the general designation of notary.
Designation of the writer. Forb. 27. June, 1708. M' Micken.— The Lords sustained a writ executed in Edinburgh, tho' it bore only written by John Russel writer, which they held a sufficient designation. Forb. 20. Feb. 1712. Rules.— The Lords sustained *Gentleman*, as a good designation of the writer of a paper at Dublin in Ireland, conceived after the Scots form, and relative to a debt in Scotland. Forb. MS. 27. July, 1714. Murray.— The docquet of a bond being in these terms, *I have subscribed these presents,*

ents, written by George Henderson at Auchterhouse, the
 1. Dec. &c. The bond was challenged as null, seeing
 the writer was not designed. Answered, These words,
at Auchterhouse, are rather to be understood as the de-
 signation of the writer, than the place of subscribing,
 and *de facto*, the writer lived at Auchterhouse; neither
 is the omission of the place a nullity. The nullity was
 repelled. Forb. 15. Fount. 20. Feb. 1706. Duncan.
 — A contract of marriage, bearing to be written by
 the said Mr John Dickson, mentioned in the former
 part of the contract as the husband, was found a suffi-
 cient designation, tho' the Mr John Dickson the hus-
 band was not designed; for it was equivalent to saying,
 "Written by Mr John Dickson, who was married such
 a day, and to such a woman," a very sufficient desig-
 nation, at least to every party concerned in the con-
 tract. Forb. 22. Dec. 1710. Dickson.

IN an instrument of intimation of an assignation, one
 of the witnesses being only designed *In-*
dweller in Edinburgh, it was found incum- *Of the wit-*
 ment on the assignee, being in a competi- *nesses.*
 tion with an arrester, to make a more
 particular condescendence. Stair, 21. Feb. 1672,
 Bailie. — The Lords repelled this reason of reducti-
 on of a disposition granted after the act 1681, *viz.* that
 one of the witnesses was not sufficiently designed, be-
 ing only designed *Indweller in Edinburgh*; but then they
 thought, if the pursuer insisted for it, that the defender
 would be obliged to condescend whither the witness was
 dead or alive, and to distinguish him so as to be known
 from others of the same name. Here the party's
 subscription was not denied, it was only suspected
 that the disposition, which was granted by a woman,
 was antedated, in order to prejudge the husband of
 his *jus mariti*. Fount. 29. Nov. 1698. Grant. —
 Witnesses in a bond being designed thus, (A) *writer*
residing at Leckie, and (B) *at Leckie*; the Lords found, That these
 words (*at Leckie*) were the designation of both the
 witnesses, and so repelled the nullity, and sustained
 the bond. Fount. Forb. 14. Dec. 1708. Sheriffs. —
 Witnesses to a bond being designed thus, "Gilbert
 Elliot inserter of the sum, and Archibald Neilson
 servitor to the Laird of Cavers;" the Lords found
 VOL. V. H the

the bond null, the first witness not being designed, that it was urged, That the designation *servitor, &c.* may naturally enough be applied to both, and *de facto* both the witnesses were servants to Cavers at the time Bruce, 9. Nov. 1714. Halden.—A bond granted by principal and cautioner was docqueted thus, *Witness whereof, I (viz. the principal debtor) have written and subscribed these presents, &c. before these witnesses &c.* The objection was, That the docquet did not bear that the two witnesses to the subscription of the principal, were also witnesses to the subscription of the cautioner. The Lords, notwithstanding, sustained the deed, for they constructed these words in the beginning of the bond, *We bind and oblige us, &c.* as to connect with the words, *before these witnesses, &c.* Forb. 14. Feb. 1712. Orr.

Other Requisites.

A BOND was sustained wanting a date, as having a term of payment. Dur. 11. Dec. 1621. *Date.* Hamilton. Stair, 15. Jan. 1661. Grant. Forb. 1. Fount. 2. July, 1712. Mth doune.—A declaration sustained, tho' wanting a date. Forb. 21. July, 1711. Ogilvie.—A bond wanting a date, it was referred to the defender's oath that he subscribed the same. The Lords found this relevant to support the bond, with this provision, That the defender might add to his oath what quality he thought fit; which looks as if the bond, in that form, was considered to be simply null. Stair, 7. June, 1666. Crawford.

THE Lords refused to find a writ null, upon this ground, That it mentioned not the place where it was granted. Forb. 14. July, 1709. Vallange. Forb. 21. July, 1711. Ogilvie.

IN a question, If submissions fall under the stamp act, it was urged, That a decree-arbitrari needs not be stamped, being *quasi* a judgment.

al act; but that a submission is a contract, and ought to be stamped as much as any other contract. The words found, That submissions are comprehended under the act. 1. Jan. 1726. Crawford.

Solemnities of Deeds wrote Book-ways.

IT was objected against a *fasine*, That the witnesses did not sign every leaf, as required by act 17. parl. 1686; it was answered, That the act was repealed by act 15. parl. 1696, by which it is sufficient that witnesses sign the last page. Replied, It neither was nor ought to have been repealed, parties subscriptions being in check in securities wrote book-ways, that no new sheets be put in; but in *fasines*, where the witnesses subscribe not every page, there is no safety against the notary, who may alter and innovate *fasines* at pleasure. Replied, The last act is general, statuting with relation to all securities, without limitation, nor is there any good reason for a distinction, a *fasine* beyond it's warrant being a very harmless instrument, and it must be registred within a very short time to make it effectual against third parties. The Lords repelled the objection. June, 1716. Findlater. Jan. 1725. Buchan. *N. B.* This was reversed in the House of Peers.

Privileged Writs.

A LETTER sent to France commissioning *Writs*, was not sustained to produce *action*, upon which it was proved to be *holograph*. *Dur. Deeds in re mercatoria.* 4. Feb. 1627. Pyram. But there-
after missive letters, in re *mercatoria*, were sustained upon the bare subscription of the party, without being *holograph*. *Dur. Spec. (Obligation)* 2. July, 1632. Ramsay.—A commission from one
H 2 merchant

merchant to another sustained, tho' subscribed only by initials, without witnesses. Stair, Gof. 11. Jan. 1676. Thompson. — A tripartite contract *in re mercatoria* subscribed by the three parties, was sustained, tho' wanting both writer's name and witnesses. Stair, 19. July, 1676. Forrest.

THE Lords found, That without regard to the act of parliament 1681, custom must be the rule in protest of bills of exchange, as well as in the bills themselves, and therefore, a protest was sustained, tho' the witnesses were neither designed nor subscribing. Fount, 21. July, 1697. Inglis.

A TICKET for a sum of money, confessed to be owing for furnishing, and subscribed by the party, will be sustained, altho' it was not accompanied by date and witnesses, if the particular accounts be extant to which the ticket refers. Hadd. 9. Jan. 1611. Simpson. — A subscribed account of furnishing, tho' without witnesses, is sustained. Hadd. 6. March, 1611. Arnot. Gof. 25. July, 1676. Campbell. — A debtor's naked subscription to an account of disbursements found probative, seeing he did not offer to deny the subscription of the said account to be his hand-writ. Dur. 11. Jan. 1628. Rule. — The simple subscription of the debtor to accounts furnished to him, were found probative without witnesses against his heir, altho' some articles of the account bore trifling sums of money advanced by the merchant: but the bare subscription was not found sufficient for annual rent, tho' the account bore the same. Stair, 2. Jan. 1678. M'Lurg. — The Lords sustained a person's receipt of victual sold to him, subscribed to an account thereof, as probative, tho' wanting writer's name and witnesses. Forb. MS. 27. Jan. 1714. Leslie.

DISCHARGES by a master to his tenants sustained against him, tho' neither holograph, nor having witnesses. Stair, 4. July, 1667. Schaw. Dirl. Stair, 7. Nov. 1674. Boyd. — The like; Fount, 24. March, 1685. Glendinning. — A discharge by a master to his tenant is sufficient, tho' neither holograph nor having witnesses. It is not

Discharge to
a tenant.

against him, tho' neither holograph, nor having witnesses. Stair, 4. July, 1667. Schaw. Dirl. Stair, 7. Nov. 1674. Boyd.

— The like; Fount, 24. March, 1685. Glendinning. — A discharge by a master to his tenant is sufficient, tho' neither holograph nor having witnesses. It is not

to where the discharges are granted by an annual center to an heritor. Stair, 27. July, 1667. Preston.

FOUND, That the acts of parliament, requiring writer's name and witnesses in probative writs, had no place in a writing between officers of the army concerning their pay, and which upon the matter was a letter of credit; and therefore, the subscription was sustained upon it, tho' subscribed only by the party without witnesses. Forb. 18. Jan. 1712. Montgomery.

ONE notary is sufficient to a testament, of whatever extent the subjects be. Hadd. 18. Jan. 1623. — An assignation signed for a person on death-bed, tho' only by one notary, was sustained, being of a testamentary nature. Col. Buchanan. — An assignation made on death-bed of a great sum of money, and signed for the party only by one notary, was found null at the instance of the debtor; altho' it was alledged, That one notary might validly have made his testament for him, and therein have disposed on all his goods. Hadd. 25. Jan. 1610. Wardlaw.

THE Lords sustained a testament as a probative writ, altho', 1^{mo}, it did not design the grantor, but only said *I undersubscribing*, yet named his brother and sister universal legators, and designed them; 2^{do}, altho' it did not name an executor, which is *caput & fundamentum testamenti*; 3^{tio}, Tho' it did not bear who was the writer; and this, because it was done among soldiers, and in New Edinburgh in Caledonia, where there was not *copia peritorum* to be had. Fount. 1. Jan. 1708. Ker. — A testament, made by a Captain of one of the Darian ships, labouring under the following nullities, viz. 1^{mo}, Its wanting the writer's name; 2^{do}, Its having no witnesses adhibited to it; 3^{tio}, Its wanting date and place; was nevertheless sustained, the Lords finding no other testament in competition, it being always proved to be holograph. Fount. Forb. 20. Jan. 1709. Pennycook.

A TESTAMENT, all written with the testator's hand, tho' wanting date and witnesses, and not subscribed,

scribed, was nevertheless found sufficient to make the testator's brother his executor. Hadd. 5. Dec. 1610.

A DECREE-ARBITRAL is not a privileged writ, and therefore was found null, wanting witnesses. Fount. 28. July, 1701. Pitcur.

A TACK of teinds being set to an heritor, with this condition, That if he did sell the lands, the tack should be void; and the heritor having sold the lands, and the titular assigned the contract to a third party, who insisted upon the irritancy, a missive letter produced under the titular's hand, bearing his consent to the alienation of the land, was sustained, tho' without witnesses, as a good proof of his consent, even against the assignee, until the same were challenged in an imprecation. Der. 12. Feb. 1629. Leslie.

It being libelled, That L. 100 was sent to the defender to buy furniture, and that most of the sum was not bestowed, and therefore, craving repetition; a missive letter, tho' not holograph, was sustained as a sufficient instruction thereof. Stair, 28. Feb. 1671. Northesk. — A party sued upon his bond, producing a missive letter, not holograph, and containing a discharge of the bond, with an apology why he sent not the bond, it not being then in his hands, and promising to send it to him; the Lord found, That the letter not being holograph, could not instruct payment of this bond, not being *in re mercatoria*, nor between strangers; but only a bond of borrowed money between gentlemen. Forb. 22. Dec. 1700. Fount. 11. Jan. 1712. Gordon. — It was found That a letter, not being holograph, was not sufficient to infer an obligation upon the subscriber, tho' it related to the mother of a married child, and was insisted upon, as coming in place of a contract of marriage, which is favorable. 22. Feb. 1748. Strachan.

It was found no objection against a promise, contained in the postscript of a holograph letter, that the postscript was not subscribed; because, tho' in other cases, the want of subscription argues that the writ itself is imperfect, the parties having changed their

mind

minds, yet this holds not in the postscript of a letter, seeing the letter was sent. Stair, Gilm. 25. July,

1662. Wauchop. — The like; Bruce, 10. July,

1717. Paterson.

A CONTRACT of marriage is not a privileged writ; and therefore, there being cautioners in a contract of marriage, for payment of the jointure, the contract was found null as to them, because subscribed only by one notary, tho' the subsequent marriage did homologate the contract, so as to bind the principal parties. Dur. 30. June, 1625. Gilm. 15. Dec.

1664. Campbell. Newb. 23. Dec. 1667. Campbell.

— A contract of marriage, bearing date since 1681; in which the witnesses were not designed, was found null, tho' marriage had followed upon it; and the defect was not allowed to be supplied by a condescendence of the designations. Feb. 1728. Montrose.

Peculiarities anent the subscribing mutual Contracts and Decrees-arbitral.

WHERE a mutual contract is contained in one paper, the subscription of both parties is necessary, but if executed by two counterparts, it is sufficient if each subscribe the paper containing what is prestable upon himself. Upon this footing there being two doubles of a contract, a marginal note signed only by one of the parties, was sustained, being in favor of the other party. Mount. 17. June, 1701. Smith.

THREE doubles of a writ being drawn, it was found to be no nullity, that in two of them the writer's designation was neglected, the third being formal. Bruce's MS. 3. July, 1706. Cubison.

A DECREE-ARBITRAL was sustained, altho' the blank on the other side was not subscribed by the parties, but by the arbiters only, seeing the submission was duly subscribed. Dur. 7. March, 1633. Beattie. Forb. 12. March, 1707. Knox. — Where the blank on the back, in which the decree-arbitral was afterwards filled

led up, was duly subscribed for the parties by two notaries and four witnesses, the decree-arbital was sustained, tho' in the submission, there were only three witnesses adhibited to the subscription of the notaries. Dur. 26. Jan. 1625. Fairlies.

THE Lords sustained this reason of reduction relevant to reduce a decree-arbital, viz. That the blank on the back of the submission was subscribed by the arbiters at the same time that the submission was subscribed, and not after inserting the decree arbitral: and they found the alledgeance proved by the docquet of the submission, in the following words, "And the parties and arbiters, in token of their acceptance, have subscribed these presents, with the blank on the back thereof, the said 7. Jan." &c. Forb. 1. Jan. 1706. Row. — In a cause depending before the privy council, a committee of their number being delegated to examine witnesses, and the cause being submitted to this committee, a decree-arbital not signed by the plurality, but only by him who was chosen preses of the meeting, while they acted as a committee, was found null. Forb. 7. July, 1708. Paton.

Delivery, in what Cases necessary?

A FATHER having disposed his estate to his eldest son, with warrandice, did, thereafter, deliver certain bonds of provision to his other children. It was found, That these bonds of provision, tho' prior in date to the son's right, yet posterior in delivery, could not affect the intervenient fee. Dirl. 9. Stair, 10. Jan. 1668. Glencorse. — A bond being subscribed by a debtor and most of the cautioners, and delivered to the creditor to be given to another of the cautioners to subscribe, which he having done, and being sued in an exhibition, it was found, That he might lawfully cancel and take his own name therefrom, since he had never delivered it to the creditor, after subscribing: but that he be-
loved

oved to give it up to the creditor in the same state as
 e got it, with respect to the other parties subscriptions,
 Dur. 5. March, 1628. M'Gill. — The like; Dur.
 4. July, 1634. Glendinning. — In order to defeat
 an arrestment, it being alledged, That the common
 debtor had discharged the debt, before the date of the
 arrestment; it was found, That the discharge could
 operate nothing, unless delivered to the debtor him-
 self, or some other for his behoof, before the arrest-
 ment. Stair, 13. Dec. 1661. Boyd. — An obliga-
 tion to dispose lands, being put into a writer's hand, in
 order to form a charter thereupon, it was found, That
 the purchaser could not have exhibition of the bond, nor
 oblige the seller to implement, unless he could subsume,
 that the bond was given, to the writer for the purcha-
 ser's behoof, in order to be delivered up to him. Dur.
 Hope, (*Alienation*) 16. Dec. 1626. Byres. — A
 lady having judicially ratified an assignation to part of
 her jointure, but still having kept the assignation in her
 own custody; the Lords found the alledgeance of not
 delivery relevant to free her from the assignation, and
 that it was not elided by the judicial ratification. Home,
 Jan. 1685. Bathgate.

A CHARTER granted by a husband to his wife,
 found sufficient to defend her against the
 heir, tho' no sasine had followed upon *Deed in fa-*
 it; but it was also found relevant for e- *vor of a*
 viding the same, to prove by her oath, *wife.*
 That the charter had never been deli-
 vered to her by her husband, but had been taken out
 by her from his writs, after his decease, altho' it was
 not alledged, that the same had been revoked or al-
 tered by her husband in his lifetime. Dur. 14. Dec.
 1627. Dickson. — A postnuptial bond for a liferent-
 provision, executed by a husband in favor of his wife,
 which is not revocable as *donatio inter virum & uxorem*,
 and found lying by the deceased at his death, was su-
 stained, tho' the granter altered and recalled the same
 by a writ under his hand; because such a deed is as ef-
 fectual from its date, as if it had been delivered; in
 respect that a deed by a husband in favor of his wife
 admits not of delivery, he being in law the custodier
 of

of his wife's writings. Bruce, 18. Feb. 1715. Lindores.

A MUTUAL contract becomes an effectual deed upon the subscription of the parties, and requires not delivery to complete it. Dur. 29. June, 1625. Crawford. Dur. 23. June, 1626. Maxwell.

A RIGHT *inter vivos* was found to be good without delivery, the grantor's liferent being therein reserved, with a power to dispose of the right itself during his life. Stair, Col. 19. June, 1668. Hadden. — A disposition bearing a reservation of the disposer's liferent, with power to alter, was found effectual without delivery, or a clause dispensing therewith. Stair, Fount. 11. Dec. 1679. Stark.

A BOND of provision in favor of children, lying by the father at the time of his decease, sustained without delivery, tho' dated 25 years before. Dur. 11. Nov. 1624. Children of Wallace. — A bond executed by a father, obliging himself to insert a younger son in certain lands, and lying by the grantor at the time of his decease, found effectual. Dur. 20. Feb. 1639. Cardross. — A disposition of tailzie, latent and uncomplete, lying by the maker at his death, was found effectual, tho' neither delivered, nor containing a clause dispensing with the not-delivery. Stair, 26. July, 1677. Stevenson. — The Lords sustained an assignation as valid, made by a father to his son for infamized, tho' never delivered. Forb. 16. Dec. 1712. Monro. — Assignation of a bond by a father to his bastard son, lying by him at his death, found good without delivery. Stair, 23. Feb. 1663. Aitkenhead.

— A woman after making her testament, having executed an assignation of a bond of 1000 merks in favor of her brother's relict in liferent, and the children in fee, this bond and assignation, lying by her at her death, was found effectual, without delivery. Fount. 1. Jan. 1706. Trotter.

A DECLARATION under the deceased's hand, bearing a former disposition, which he had granted with a power of alteration, to be null and void, and ordaining the

he heirs of line to succeed, was found effectual without delivery. Stair, 6. Jan. 1680. M'Bride.

A FATHER having made a tailzie, dispensing with the not-delivery, and thereafter having made several other deeds relative to the first, and altering the same in some particulars: but not containing a clause dispensing with the not-delivery; the Lords ordained all these writs to be given up to the heir of tailzie, being living by the decease at his death; the first disposition of tailzie, in respect of the dispensing clause, and the rest, as being accessory thereto. Stair, 23. July, 1669.

Ellies. — One having granted a disposition of some goods, without an onerous cause, containing warranty from fact and deed, and dispensing with the not-delivery, and thereafter having disposed some of the same goods to another; in a competition, it was adjudged for the first disponee. That the disposer could not take away his *jus quæsitum*. Answered, The first disposition was never delivered, and the clause, dispensing with the not-delivery, could not hinder the disposer to alter or innovate at his pleasure, all the use of the dispensing clause being only to hinder heirs or executors to quarrel the deed for want of delivery. The Lords preferred the second disposition. Harc. (*Alienation*) March, 1683.

AN heritable bond by one to his nephew, found effectual, tho' never delivered, having been given thereupon, *Registration equivalent to delivery*, which was in the public register, whereby there was *jus quæsitum* to the nephew. Stair, Dirl. 23. June, 1675. Bruce.

Writs defective in Solemnities, if capable of Support, so as to furnish Action.

THE act 179. parl. 1593. statutes, "That all writs and evidents shall make special mention in the end thereof, before inserting the witnesses, of
Done before
 1681, wanting
 " the

the writer's name or designation. by the name and designation of the writer, otherwise the same make no faith in judgment or on with. It is not extremely clear what is intended here, whether that the omission of the writer's name and designation should make the deed *ipso jure* null, so as to deny action upon it, or it should only furnish an exception to the defender: if the first, the writ is no better than blank paper, and consequently not capable of support by homologation, or otherwise; if the last, the exception must resolve into this, That the deed is not a full legal proof, which of course leads the pursuer to support the deed by making a proof who was the writer, or by alledging that the defender has acknowledged the deed, and homologated the same, which must bar him from making any objection to its veracity. Our judges have interpreted the act in the last sense; and therefore, in a question upon this act, the omission of the writer's designation was allowed to be supplied by condescending upon the same. Spot. (*Writs*) 12, March, 1628. Dillington. Stair, 5. Dec. 1665. Cunningham. — The user of a discharge that was null for want of the writer's designation, was allowed to supply the same, by condescending upon the writer, if alive, or, if dead, by producing several of his manuscripts to be compared with the hand-writ of this discharge. Stair, Dirk. 22. Feb. 1676. Innes. — A minute of a contract, wanting the date and the writer's designation, was sustained as a contract of marriage, the marriage having followed, and the pursuer condescending that it was the hand-writ of her husband. Dur. 18. Jan. 1637. Wolf. — The writer of a bond before 1681, being designed servant to one not designed, a condescendence upon the designation of that undesignated person, abstracted by an assignation from the creditor in the bond, wherein one of that name was so designed, was, by the Lords, sustained sufficient to supply the defect. Forb. 28. Jan. 1713. Scot Lady Hackshaw. — In like manner the defect of a bond which wanted the writer's name altogether, was allowed to be supplied by a condescendence upon the writer, and a proof that he wrote the bond. Forb. 2. Fount, 25. Feb. 1710. Sharp.

IT was objected as a nullity to a bond of shirlege, that tho' subscribed by two notaries and four witnesses, one of the witnesses was not designed, nor so much as inserted in the body of the writ. The Lords found the bond null upon the act 80, parl. 1579, and that the defect was not sup-
Deed before 1681, wanting the witnesses names or their designations.

pliable by condescending on the designation of the witnesses, tho' the certification of this act is not more express than of the act 1593, being almost in the same words. 25. Jan. 1738. Low.
 BY act 5. parl. 1681, it is enacted, "That all writs subscribed by any party, wherein the writer and witnesses are not designed, shall be null, and not sup-
Deed after 1681, wanting the names or designation of the writer or witnesses.

pliable by condescending upon the writer, or the designation of the writer and witnesses." Upon this clause a bond was found null, which wanted the name of the writer, tho' a most pregnant proof was offered, that a person condescended on wrote the bond, and who was also produced in court to depone upon the fact. Fount. 1. Nov. 1704. Kirkpatrick.—In the like manner, an obligation bearing date since the act 1681, was found null for want of the writer's designation, and not sup-
 pliable by offering to prove by oath of the grantor's heir, that it was truly subscribed by his predecessor, and never satisfied. Forb. 4. Jan. 1710. Logic.—One of the subscribing witnesses in a bond, since the 1681, being, by mistake, named in the writ by another Christian name than his own, the bond was found null, and not suppliable, because, strictly speaking, the witnesses were not so much as named in the bond. Fount. Dalr. Forb. 15. July, 1707. Abercrombie.

BUT a bond since 1681, of which the debtor had paid a part, was sustained, tho' the designation of one of the witnesses was wanting, which must be upon this noting, That the nullity mentioned in the act is not total nullity to bar action, but only such as to furnish the defender with an exception, which he may renounce, either by express consent, or by consent im-

pled in acts of homologation. Bruce, 17. Feb. 1770
Sinclair.

• A DECREE-ARBITRAL being challenged in a
duction, because the submission on which
Dead wanting it proceeded was null by act 1681
witnesses. there being only one witness to
subscription of one of the parties, the
defence was, That the submission was homologated
by the parties appearing and pleading before the ar-
biters. Answered, This may give it the effect of
verbal submission, which by law is reducible upon in-
ty, but cannot make a null writ valid. Replied, A writ
tho' defective, upon the act 1681, is not *ipso jure* null
it has an effect in law as being sufficient to found
process; it is credible indeed by exception, but if the
party do not chuse to move his exception, it is not
judicis to take notice of it; and the acts of homologation
mentioned, are sufficient to bar the party, *personali*
jectione, from moving his exception. The Lords
sustained the defence of homologation. 21. Jan. 1770.
Tailfer.—A minute being null for want of witness
was nevertheless sustained, as having been homologated
by the party, in so far as he received an assignation
appointed in the minute to be made to him by the other
party, and comprised thereon. Nicolson, (*Hologra-*
tion) 12. July 1620. Gordon.

• A TICKET, neither holograph nor having witness
cannot be sustained by referring to the defender's oath
that the subscription is his hand-writ, because the ob-
igation being null is not suppliable by any sort of proof
and therefore, the verity of the debt must be *simpliciter*
referred to the defender's oath, and that it is still re-
ing owing; which was the rather found, that the ob-
igation was 25 years old, and the money never deman-
ed before. Dur. 14. Feb. 1633. Rankin.—In a
like case, the Lords found, That the defender must
adjust what quality he thought fit, and was not bound
to depone *simpliciter* upon the verity of the subscrip-
on. Dur. 11. Feb. 1634. Cassimbro.—A ticket
from one brother to another, bearing, *That he should*
pay the half of the expences of the reparation of a certain
house, found null, as not being holograph, and without
witnesses: and the offer was not found relevant.

prove the verity of the subscription by witnesses, or *comparations literarum*, tho' being between two brethren in *re medica*, not much exceeding L. 100. Air, 5. Dec. 1671. Dickson.—In a suit upon the five titles for payment of a bond, it was objected, there was but one witness to the bond. In order to support the bond, a proof being admitted, other writings were produced of the debtor's hand-writing, and one witness deponed that the subscription was his. The Lords found these not sufficient to support the bond. Air, 4. Jan. 1668. Dow.

THE act 5. parl. 1681, which declares, That writings shall be null, unless the witnesses be designed, goes upon the supposition, that there must be two witnesses; and as the want of the witnesses designations are not suppliable by a condescendence, far less will a proof be admitted that there were *de facto* witnesses, when none are named in the deed. But as these nullities amount not to a *denegatio actionis*, but resolve into an exception; the act does not say, that the subscriber of the writ may not be barred from his exception by homologation; and if by homologation, which is but an implied acknowledgment of the verity of the deed, *multo magis* by a direct acknowledgment upon oath: and therefore, a contract null upon this act, as being subscribed only by one witness, was found suppliable by referring the verity of the subscription to the party's oath. Fount. 26. Dec. 1695. Beattie.—But where there are no witnesses at all, the objection amounts to a *denegatio actionis*, and which, therefore, does not admit of being supplied, as was found in the case of a missive letter wanting witnesses altogether. Forb. 1. Dec. 1710. Fount. 11. Jan. 1711. Gordon.—Four persons signed an order or commission to a cooper-master in Leith, for building a ship of 50 tons burthen, to be delivered to them for their respective interests. The ship was accordingly built, and every one paid his moiety, except Balfour, whose defence was, That the order or commission was null by the act 1681, as wanting witnesses. Answered, 1710, the defender does not pretend to deny his subscription, and that is sufficient to bind him to all the terms and conditions expressed in the writ. 2do, The defender is

is removed *personal objection* from pleading the nullity, who saw the pursuer laying out his stock and labour upon his account in pursuance of the commission, after which it would argue the greatest turpitude if he should refuse to perform his part of the bargain. The Lords found the defender liable. July, 1716. Hendenfott.

A DEED being subscribed by notaries, because the party could not write, was found null, because the notary's subscription did not bear, that it was by command of the party; nor was it found suppleable by a proof of witnesses, that the command was actually given, because even in ordinary cases order or command is not so probable. Stair, 26. July, 1667. Philip.

A TACK null, as signed by two notaries upon different days, and not *unico contextu*, where notaries found homologated by the tacksmen, have not signed entering into possession. Dur. 23. Jan. 1624. M'Moran. — The like, with regard to an investment of annualrent in virtue of which the creditor had been in possession of the lands for many years. Dur. 20. Spot. (Contract) 21. March, 1633. Cow.

A BOND subscribed by two notaries before three witnesses only, was found homologated and unquarrellable, by payment of annualrent for several years. Nicolson (Annualrent) 20. Nov. 1627. Lockhart.

A decree-arbitral being quarrelled, that, being in a matter of importance, the submission was signed only by one notary; the Lords sustained a receipt of 1200 merks, paid in consequence thereof, as a sufficient homologation; for the receipt laboured under the same defect, yet it was still good as to L. 100 Scots. Fount. 23. Nov. 1667. Grierson, &c. — An assignation null, as being signed only by one notary, was found to be good against the cedent, who homologated the same, by granting a discharge relative thereto. Hadd. 7. March, 1667. Boswell. — A contract of marriage, subscribed only

one notary before witnesses, is not quarrellable upon that head, either by the husband or wife, or their representatives, provided marriage have followed upon it, because the marriage is an act of homologation, which bars them from making the objection. Spot. (Marriage.) 6. July, 1626. Cheap. Dur. 10. Dec. 1630. Nisbet. Stair, 1. July, 1662. Bready.

A DISCHARGE null as subscribed only by one notary, may be supported by an offer to refer to the creditor's oath, the verity of his command to the notary to subscribe for him. Hadd. 22. June, 1611. Redpath.

—An obligation of great importance null, as subscribed only by one notary and three witnesses, may be supplied by the party's oath, if he be in life. Hadd. 29. Nov. 1609. Weir. — The like; Dur. 8. July, 1623. Sheriff of Cavers. — A submission being signed

by two notaries, and prorogated by one only, upon the decree's being quarrelled, because the prorogation was not subscribed by two, the defect was found suppliable by the party's oath. Col. — A deed of importance

being objected to, as subscribed for the party but by one notary before four witnesses; and it being referred to the party's oath that he gave command to the notary, he acknowledged the fact, but insisted that the contract was not in the terms agreed to by him. Upon this it was pleaded for the party, That a deed null for want of solemnities required by law, cannot be supplied by the party's oath, so as to make a *literarum obligatio*. An-

swered, 1^{mo}. Deeds null for want of legal solemnities are capable of homologation, and therefore may be supported by oath. 2^{do}. Whatever may be thought with regard to the solemnities of the act 1681, statuting that these cannot be supplied by homologation or oath, the present case is different: two notaries are required in deeds of importance, as a more firm evidence of the party's consent, and not in way of solemnity; and the party's own acknowledgment of his consent, is in all views a stronger evidence than that of two notaries. The Lords sustained the contract. 4. July, 1739. Crossbie.

ONE having bound himself in the marriage-contract of his wife's sister to give with her 200 merks of tocher, and the contract being quarrelled by his heir, as being signed only by one notary and two witnesses, the Lords

repelled the objection, the marriage having followed, and there being two decrees standing upon the contract, first a decree of registration against the obligant himself, and thereafter a decree of transference against the heir, who had now suspended the same. Dur. Spot. (*Marriage*) 11. March, 1628. Muir.

A BILL of exchange null, as bearing annual rent and penalty, was found not homologated even by a posterior payment of part of the principal sum: for if it was not good as a bill, it could be considered as nothing but a note, neither holograph nor having witnesses, which in our law cannot so much as furnish an action. Feb. 1730. Chatto.—The direct contrary was found. Feb. 1733. Brown.

Penalty of falsifying Writs.

A BOND being antedated in order to save it from an inhibition, was found null *in totum*, and the Lords in *panam falsi* refused even to sustain it, as granted of its true date after inhibition. Dur. 10. Feb. 1636. Edmondston.—A bond being produced vitiated in the sum, by a superinduction of pounds sterling, was refused to be sustained for the original sum, but found null *in totum*. 26. Nov. 1723. M'Douall.—A marginal note being proved to be a false date, this was found to annul the marginal note only, because the brocard, *falsum in uno falsum in omnibus*, holds only *in articulis connexis*. Marc. (*Inhibition*) Feb. 1638. Johnston.—In an inhibition of a precept of false, it being found raised and falsified in the name of a room, was only declared false as to that point, and sustained for the remainder, because, one of the parties whom it concerned, *erat particeps falsitatis & doli*. Hadd. 27. June, 1597. Keir.

AN objection to a testament, consisting of one sheet, that in the end of the last page, it did not mention how many pages were *Later decisions.* therein contained, as required by the act 15. 1696, was repelled. Home, p. 313. 4 Feb. 1742. Robertson.

AN objection to a holograph bond, consisting of three pages, that it was only signed on the last page, was also repelled. Home, p. 357. 12. Dec. 1742. Williamson.

THE charger being creditor to the suspender by bill, of date the 26. Nov. 1739, charged him for payment, who suspended on this ground, That the bill charged on, was comprehended under a general discharge, granted by the charger to him the 14. June, 1740, containing a receipt of payment of all accompts, bonds, bills, clags and claims that were ever between them, preceding the date of the discharge. Answered for the charger, That the general clause in the discharge was inserted through the inaccuracy of the charger, an illiterate country man; and that it was not understood between them at that time to have that meaning to comprehend the bill in question, which he offered to prove. *2dly*, Objected, That the discharge, not being on stamped paper, could not avail in law or equity. See the act 12mo *Anna*. Replied for the suspender, His reason of suspension being verified by writing, under the hand of the charger, the same cannot be otherwise taken off, than by his own oath. *2dly*, The discharge is not a deed of that kind which requires to be wrote on stamped paper. See Wood's Institutes. The Lords found, That the discharge did not require stamped paper. Home, p. 382. 17. June, 1743. Christie.

A DEED, bearing in the testing clause to be signed by notaries, and being accordingly signed by them, but without expressing that they had a mandate, was not sustained. Falc. v. I. p. 101. 18. June, 1745. Burrell.

A PERSON owning his subscription to a missive not, holograph, is bound by it. Falc. v. I. p. 187. 20. Dec. 1746. Fogo.

A FACTOR's accompts before 1681, being docquetted before witnesses, whose names and designations were

were not inserted, the defect was found suppliable. Falc. v. I. p. 198. 20. Jan. 1747. Douglas.

A BOND was sustained by a principal and cautioner tested thus, *I have written and subscribed before these witnesses.* Falc. v. I. p. 322. 11. Feb. 1748. Taylor.

THE debtor in his aunt's portion, having signed as consentor on the last page of her contract of marriage, whereby she conveyed it, and which was tested to be signed by both parties before witnesses, was not thereby precluded from his defences against any part of the portion assigned. Falc. v. I. p. 323. 11. Feb. 1748. Bothwells.

AN informal writing on unstamped paper, with an address to a writer subjoined, to draw an agreement in form, was sustained between an heritor of the mill and the sucken. Falc. v. I. p. 342. 7. June, 1748. Rutherford.

IF two deeds of different dates, are written on one piece of stamped paper, the first is good, the second null. Falc. v. II. p. 88. 11. July, 1749. Ross.

A BOND of corroboration, not containing the sum is null. Falc. v. II. p. 88. 11. July, 1749. Colt.

A BLANK writ is null, unless filled up before the witnesses. Falc. v. II. p. 90. 12. July, 1749. Donaldson.

WRIT being subscribed by different parties at different times, and a witness to all the subscriptions, having wrote his name before that of another, who was only witness to the first, so that it was said he had wrote before the later subscriptions, and it did not appear whether they were made before him or not; the writ was sustained. Falc. v. II. p. 121. 6. Dec. 1749. Edmondston.

A SASINE was sustained, tho' bearing only one delivery of the symbol to a bailie for several distinct annualrents. Falc. v. II. p. 164. 19. June, 1750. Grant.

A BOND with a penalty, to an officer of the customs and his successors, to be paid in case any of the obligee's tenants should smuggle, found void. Falc. v. II. p. 277. 12. Nov. 1751. Stewart.

A DISPOSITION

A DISPOSITION of heritage, by a person who used to sign by initials, subscribed by his full name, by means of a copy being placed before him, and also the letters marked with a pin, was found null. Fac. Col. v. II. p. 198. 28. Nov. 1750. *Grosbie, etc.*

THE objection, that the attestation of the notary to a *fasine*, did not mention the number of leaves whereof the *fasine* consisted, was repelled, in respect that the regulations of the act 1686, had not been strictly observed. Fac. Col. v. I. p. Y. 7. Feb. 1752. Clark.

IN the testing clause of a deed, these words *before the witness, and witness to the marginal notes*, was held equivalent to *witnesses*. [This deed was *inter rusticus*.] Fac. Col. v. I. p. 62. 7. Dec. 1752. Bromfield.

IF one of two instrumentary witnesses be designed brother-german, when he was in fact brother-in-law, the writ is null. Fac. Col. v. I. p. 79. 26. Dec. 1752. Creditors of Graham.

MISSIVE letters, tho' not holograph, were found sufficient to establish a tack of lands for five years, where the setter acknowledged his subscription, and the tack had taken effect by possession. Fac. Col. v. II. p. 109. 6. March, 1753. Barron.

A DEED, where the clause containing the names and designations of the witnesses was wrote partly below the subscription of the parties, was found not null by act 1681, which requires them to be inserted in the body of the writ. Fac. Col. v. I. p. 111. 11. March, 1753. Dury.

IN deeds bearing date before the statute 1681, if the witnesses are not designed, the user of the deed must condescend on the designation of the witnesses, and asstrict the same, otherwise the deed is null. Fac. Col. v. I. p. 122. 28. July, 1753. Urquhart.

A TACK null, for the want of the witnesses subscriptions, was found validated by the tacksmen's possession. Fac. Col. v. I. p. 141. 18. Dec. 1753. Grant.

AN indenture, signed by one notary and three witnesses, can only produce action to the extent of L. 100 Scots. Fac. Col. v. II. p. 202. 30. June, 1758. Fergusson.

OBJECTION

OBJECTION to a mutual contract, subscribed by both parties, but bearing only in the testing clause, *Subscribed by my hand*, was repelled. Fac. Col. v. II. p. 294. 9. Feb. 1759. Dunbar.

AN objection was sustained to a testament signed by notaries, that the witnesses did not hear the deceased give orders for signing, nor see her touch the pen. Fac. Col. v. II. p. 409. 25. June, 1760. Farmers.

THE stamping an extract of an indenture was found sufficient. Fac. Col. v. II. p. 498. 19. Nov. 1760. Shepherd.

THE subscription of a party, after subscription of instrumentary witnesses, and not in their presence, is not valid. Fac. Col. v. III. p. 24. 2. Feb. 1761. Young.

A CHARTER wanting the name and designation of the writer, is null. Fac. Col. v. III. p. 72. 16. June, 1761. Gordon.

WRIT, how far probative? *See Probation.*

VITIATED writs, how far probative? *Ibid.*

VITIATION whether presumed fraudulent or innocent? *See Presumption.*

BLANKS, when presumed filled up? *See Presumption.*

DELIVERY, when understood made? *Ibid.*

DEEDS taken in name of third parties, if good without delivery? *Ibid.*

DEED of importance signed but by one notary, will it be sustained for L. 100? *See Indivisible.*

WRONGOUS

WRONGOUS IMPRISONMENT.

A MAN being charged and imprisoned by an assignee to a contract, which had been implemented to the cedent, and suing the cedent for wrongous imprisonment, damages, &c.; the Lords refused action, because he had not suspended. *Action upon it at common law.* Fount. 17. July, 1678. Durkie.

AN episcopal minister, who had been deposed by the present church judicatories, being apprehended by the bailie of a burgh, while he was preaching there, and imprisoned on that account, altho' he had taken the public oaths, insisted for the penalty of the new act of parliament touching wrongous imprisonment. The Lords found, That there was no necessity of a written information in this case, seeing the bailie himself came along to the place where the minister was contravening an act of parliament, and the act of his own deprivation; and found, That being under church-censure, he was in the exception of the afore-said act 1701: and further found, That a subscribed bond of cautionary, not being offered (tho' sufficient cautioners appeared and offered themselves bail for him) the bailie committed no fault in refusing to set him at liberty; and therefore assolizied from the process. Fount. 5. Jan. 1704. Peacock.—A party by bill insisting upon the penalty of the act of parl. 1701, because one had imprisoned him for a debt, tho' it was paid by intromission with his rents; the Lords found, That he could claim no such privilege, the act relating only to imprisonment for crimes; but thought, That even in the case of debts, the party had an action for damages by the common law, before the act

1701

108 WRONGOUS IMPRISONMENT.

1701 was made; Fount. 10. Feb. 1705. Gordon.
—Which action was sustained that very day. Robertson.

IN FORGERY, the person accused has not the benefit of running his letters in term
Later decisions. of the act 1701. Fac. Col. v. 1. p. 169. 9. Aug. 1754. His Majesty's Advocate.

THE house and lands of Craig belonged in property to Margaret Ogilvie Lady Airly. As she had no occasion for the house, she put it under the charge of Gilbert Fife, who had a lease of the adjacent farm, and who had a dwelling-house and other proper buildings for his own accommodation adjacent to the house of Craig. Fife executed this charge for some years, and, according to his instructions, put on fires from time to time, for which purpose he had an allowance of coal. In the year 1759, when Fife's lease was near expired, Lady Airly resolved to give the possession of the house of Craig to Thomas Mitchel. This resolution was intimated to Fife, who used various solicitations to be allowed to continue in his possession, and who at last unwillingly consented to remove at Whitsunday 1760. Alexander M'Laren, who lived in the neighbourhood, had dropped some expressions, which showed that he was not thoroughly satisfied with the prospect of Mr Mitchell's settling in his neighbourhood. Upon the 26. Dec. 1759, Fife went to make a visit to M'Laren, and did not return home till 10 o'clock at night. His servants had, as usual, put on a fire in one of the rooms, and they attended the fire till it was near extinguished, after which they went to bed, leaving Fife sitting by his own fire-side. About two hours thereafter, one of the servants observed the house of Craig in flames; and any endeavours used to extinguish the fire were vain, the house being burned to the ground. Mrs Ogilvie the next day applied to some of the neighbouring justices of peace, setting forth, That her house of Craig had been burned; that Gilbert Fife, in the mains of Craig, had the charge and management of the said house; and she had reason to think, that he, or some of his family, could account for the burning of it; and craved warrant for apprehending the said Gilbert Fife, and others residing

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residing in the mains of Craig. Accordingly a warrant was granted to that effect; and a precognition having been taken, the following deliverance was given upon it, by Robert Wedderburn of Pearey, George Yeaman Provost of Dundee, and Thomas Boyes of Dudhope: "Having considered the foregoing precognition, grant warrant to incarcerate the said Gilbert Fife and Alexander M'Laren within the tolbooth of Dundee, there to remain till further examination." Some days thereafter, M'Laren was set at liberty, and Gilbert Fife applied to be liberated upon bail, which having been refused by the justices, he applied to the court of justiciary for his liberation, which he obtained, after having been twenty-four days in prison; and, not long thereafter, he and M'Laren commenced an action of wrongous imprisonment, oppression, and damages, against Mrs Ogilvie, the three above-mentioned justices, and Mr Mitchell the factor. Pleaded for the pursuers: That the behaviour of the defenders had been in every particular, oppressive, and contrary to the act of parliament 1701, *cap.* 6. That, instead of a direct accusation against any person, as the law required, Lady Airly's application contained no more than a surmise, that Gilbert Fife, or some of his family, might probably know something about burning of the house of Craig. 2^{do}, It contained an application for an indefinite warrant, to apprehend not only Fife, but all others residing in the house of Craig. 3^{do}, The warrant itself is even broader and more indefinite than the application. 4^{to}, The warrant of commitment only bore till further examination. In such case, it was the duty of the justices to have brought the prisoners to examination as soon as possible, and either to have ended their imprisonment by liberation, or to have granted warrant to commit them specially, for a crime on which they might run their letters of liberation; but instead of this, M'Laren was detained eight days, and Gilbert Fife no less than twenty-four days, without further examination, or without the prospect of an end to his confinement. 5^{to}, When bail was offered, it was most unjustly refused, in direct contradiction to the terms of the statute, as, upon the precognition, no evidence of guilt

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whatever, appeared against the pursuers. All these things were highly oppressive, and afforded a just ground for damages, both at common law, and upon the act 1701. Answered for the defendants. That Lady Airlie's information appears to have been exceedingly proper, and plainly amounts to this, that she suspected her house had been wilfully burned by Fife, or some of his family, living in the house of Craig, and therefore she prays, that warrant may be granted for apprehending them in order to examination. The warrant granted upon this information applies directly to it, nor was any person apprehended upon it but Gilbert Fife and his family, residing at the house of Craig; the after procedure, and warrant of commitment of Fife and McLaren, until farther examination, proceeded upon the precognition, and is fully justified by the content of it, from which many very suspicious circumstances arise; and when that is the case, precognitions are always held as a sufficient ground for commitment, even in order to trial; because, it is the strongest information in writing, and the warrant subjoined to it sufficiently expresses the cause of commitment, by reference to the preceding precognition. Neither can the justices be blamed for having refused bail, where strong suspicious circumstances of guilt appeared upon the precognition; as, in such case, it is neither proper nor expedient that inferior judges should take upon themselves to grant liberations upon bail, especially where the crime is of so latent and pernicious a nature. But besides this, the *species facti* is such, that there is no one clause in the act against wrongous imprisonment which applies to it; for that act relates only to commitment in order to trial, but does not in the least relate to commitments till further examination; and, either that act of parliament, or the common law or practice of the country, make detention in prison till further examination criminal, the crime of first raising is of such a nature, that it never could be detected; because it can be executed in so private a manner, that nothing but slight grounds of suspicion could at first be expected; and, as the crime is capital, and not bailable, the judge must have a discretionary power

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er of determining how far the grounds of suspicion are such as to afford a probability, that convincing evidence of the crime may soon be discovered. If, indeed, a judge has acted in a matter of this kind with a malicious intention to oppress, there he would deserve the censure of this court; but if, on the other hand, he really appears, the law will not allow either the party or the judge to be subjected to punishment. The Lords affoizied the hail defenders, and, upon the reclaiming petition adhered. Fac. Col. v. III. p. 209. 29. July, 1762. Fife.

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